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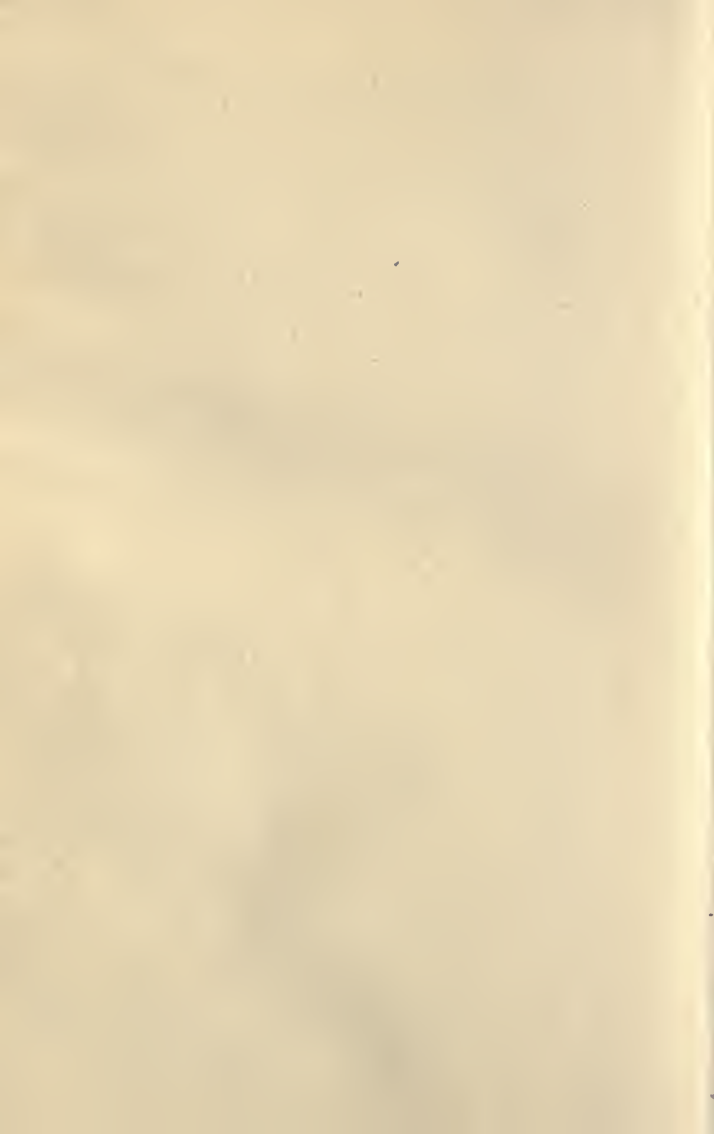
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Carlisle, Burlington Majors

THE
NOTARY'S MANUAL
(FIFTH EDITION)

BASED UPON

THE SECTIONS OF THE CALIFORNIA
CODES RELATING TO NOTARIES
PUBLIC

WITH EXTRACTS FROM AND NOTES ON STATE
SUPREME COURT DECISIONS

ALSO CONTAINS

LEGAL FORMS FOR THE VARIOUS NOTARY'S
CERTIFICATES AND PROTEST

—

PREPARED BY
A MEMBER OF THE SAN FRANCISCO BAR



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P R E F A C E

This volume, as the name indicates, has been prepared especially for the use of notaries public. It is based upon the Codes of California and the decisions of the Supreme Court of this and other states so far as they relate to the law authorizing and governing the acts of these officers, and references to all sections and decisions are given. No effort has been spared to make this book a complete and reliable guide. The chapters on deeds, mortgages and homesteads have been inserted for the purpose of giving general information on these subjects, and because the notary is frequently expected to draw as well as take the acknowledgment of these instruments. A thorough understanding of the subject of Bills and Notes is, of course, necessary to the intelligent protesting of negotiable paper, and it is believed that this important subject is clearly and concisely covered. Correct and practical forms of certificates, protests, etc., are appended.

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The Notary's Manual

FIFTH EDITION

CHAPTER I.

NOTARIES PUBLIC.

- §1 Appointment.
- 2 Eligibility.
- 3-4 Qualification.
- 5 Duties.
- 6 Compensation.
- 7 Jurisdiction.
- 8 Term of office.
- 9-10 Records.
- 11-12 Liability

Appointment.

SECTION 1. Notaries Public are public officers appointed by the governor, usually upon petition addressed to him setting forth the qualifications of the applicant and signed by citizens and residents requesting the appointment. There is no restriction upon the number that may be appointed for the several counties of the state—the governor having authority to appoint such number “as he shall deem necessary for the public convenience”—except that the number to be appointed for the city and county of San Francisco is limited to one hundred and twenty.¹

(1) Political Code, §791

Eligibility.

SECTION 2. The only qualifications required by statute are the following: The person must, at the time of appointment, be a citizen of the United States and of this state, twenty-one years of age, and must have resided in the county for which the appointment is made for six months prior thereto. Women having these qualifications may be appointed.₂

Qualification.

SECTION 3. *Official Bond and Oath.* When the commission is granted the appointee is required to execute an official bond in the sum of five thousand dollars which bond must be approved by a judge of the superior court of his county, recorded in the office of the county recorder and then filed in the office of the county clerk. He must also take, subscribe and file his oath of office in the office of the county clerk. The time within which he must file his official bond and take, subscribe and file his oath of office in the office of the county clerk, is twenty days from the date of his commission.₃

(2) Political Code, §792

(3) Political Code, §§799, 800

SECTION 4. *Certificate of Facts.* He is also required to transmit a certificate of the facts of his appointment under the hand and seal of the county clerk, together with a copy of his official oath signed by him with his own proper signature, to the office of the secretary of state, which certificate must be filed in the office of the secretary of state within thirty days from the date of his commission.⁴ He is then duly qualified to perform the duties of his office.

Duties.

SECTION 5. It is the duty of notaries public,—

1. When requested, to demand acceptance and payment of foreign, domestic and inland bills of exchange, or promissory notes, and protest the same for non-acceptance and non-payment, and to exercise such other powers and duties as by the law of nations and according to commercial usages, or by the laws of any other state, government, or country, may be performed by notaries. (See Bills and Notes, Secs. 147-235, *post.*)

2. To take the acknowledgment or proof of powers of attorney, mortgages, deeds, grants, transfers, and other instruments of writing exe-

(4) Political Code, §800

cuted by any person, and to give a certificate of such proof or acknowledgment, indorsed on or attached to the instrument. (See Acknowledgment and Proof of Instruments, Secs. 13-41, *post.*)

3. To take depositions and affidavits, and administer oaths and affirmations, in all matters incident to the duties of the office, or to be used before any court, judge, officer, or board in this state. (See Affidavits, Secs. 121-127, *post.*; Depositions, Secs. 128-146, *post.*)

4. To keep a record of all official acts done by them.

5. To keep a record of the parties to, date, and character of every instrument acknowledged or proved before them. (See Records, Secs. 9-10, *post.*)

6. When requested, and upon payment of their fees therefor, to make and give a certified copy of any record in their office.

7. To provide and keep official seals, upon which must be engraved the arms of this state, the words "notary public," and the name of the county for which they are commissioned.

8. To authenticate with their official seals all official acts.

Compensation.

SECTION 6. The fees of notaries are fixed by law and are as follows:

For drawing and copying every protest for the non-payment of a promissory note, or for the non-payment or non-acceptance of a bill of exchange, draft, or check, two dollars.

For drawing and serving every notice of non-payment of a promissory note, or of the non-payment or non-acceptance of a bill of exchange, order, draft, or check, one dollar.

For recording every protest, one dollar.

For drawing an affidavit, deposition, or other paper for which provision is not herein made, for each folio, thirty cents.

For taking an acknowledgment or proof of a deed or other instrument, to include the seal and the writing of the certificate, for the first two signatures, one dollar each, and for each additional signature, fifty cents.

For administering an oath or affirmation, fifty cents.

For every certificate, to include writing the same, and the seal, one dollar.

Jurisdiction.

SECTION 7. A notary can only transact official business in the county for which he was appointed and in which he resides. His authority is confined to the county for which he was appointed and commissioned.

In the case of Fairbanks, Morse & Co. v. Getchell, 13 Cal. App. 458, a notary public in and for the County of Kern had taken the oath of an affiant in Los Angeles to an affidavit for attachment over the telephone. The evidence showed that the affiant had related the facts contained in the affidavit to the notary and stated they were true, and that the notary was familiar with his voice and recognized it over the telephone. The act of administering the oath was declared to be a nullity, and the purported affidavit upon which the attachment was issued, was declared to be void and of no effect. It was contended in that case that an oath administered by communication had between notary and affiant over the telephone, was for that reason alone void and of no effect. This point, however, was not determined, the court saying:

“Such contention finds direct support in the case of Sullivan v. First Nat. Bank, 37 Tex. Civ. App. 228 (83 S. W.

421). According to our view, however, it is unnecessary to determine this point. Assuming, but not deciding, that an oath may be administered and the obligations thereof assumed by communication had over the telephone, the validity of such act must be held to apply to those cases only where both notary and affiant are within the territorial limits for which the notary has been appointed and commissioned."

Term of Office.

SECTION 8. The term of office is four years from and after the date of the commission.

People v. Edleman, 152 Cal. 317, is an important case relating to the term of office of notaries public. In the City and County of San Francisco where the number is limited, the question arose as to whether, upon the death of a notary, the new appointee was appointed for the balance of the unexpired term, or for the full term of four years. It was there held that the office comes into full being only when and as the governor names specific men for the places; that as to his term and office, no notary is the legal successor

(7) Political Code, §793

of another, and each is appointed for the specified term; and that since, under the law, the term of a notary is made a full term of four years from the date of his commission, and as the death of a notary does not create a vacancy, each notary when appointed is appointed, not for an unexpired term, but for the full term of four years.

Resignations must be in writing and made to the governor,⁸ and in case the office becomes vacant before the expiration of the term, the notary's records must be delivered to the county clerk of his county as set forth in the following section.

Records.

SECTION 9. *On Death or Resignation.* Exact and particular records are required to be kept of all official acts (see Duties, Sec. 5, subs. 4-5, *supra*), and if any notary die, resign, is disqualified, removed from office, or removes from the county for which he is appointed, his records and all his public papers must, within thirty days, be delivered to the clerk of the county, who must deliver them to the notary's successor when qualified.⁹ (See Term of Office, Sec. 8, *supra*.)

(8) Political Code, §995

(9) Political Code, §796

SECTION 10. *Of Predecessor.* It is further provided that every notary having in his possession the records and papers of his predecessor in office, may grant certificates or give certified copies of such records and papers in like manner and with the same effect as such predecessor could have done.¹⁰

Liability.

SECTION 11. *On Bond.* For the official misconduct, or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all damages sustained.¹¹ (See Liability on bond for failure to comply with statute, Secs. 19-21, *post.*)

SECTION 12. *Criminal responsibility.* He is also criminally responsible under Section 167 of the Penal Code, which provides that every public officer authorized by law to make or give any certificate or other writing who makes and delivers as true any such certificate or writing containing statements which he knows to be false, is guilty of a misdemeanor.

(10) Political Code, §797

(11) Political Code, §801

CHAPTER II.

ACKNOWLEDGMENT AND PROOF OF INSTRUMENTS.

- §13 Nature of acknowledgment.
- 14 Nature of proof.
- 15 Purpose of acknowledgment or proof.
- 16 Private writings may be acknowledged or proved.
- 17 Authority to take.
- 18-22 Mode of taking acknowledgment.
- 23 Acknowledgment by married women.
- 24-31 Certificate of acknowledgment.
- 32-37 Proof of execution when not acknowledged.
- 38 Certificate of proof.
- 39-41 Defective certificates.

Nature of Acknowledgment.

SECTION 13. The acknowledgment of an instrument is the declaration or admission made by the party executing it to an officer having authority to take acknowledgments, that the instrument was executed by him and the same is his act and deed. It is then the duty of the officer to indorse on or attach to the instrument his certificate of acknowledgment. (See Certificate of Acknowledgment, Secs. 24-31, *post*.) The acknowledgment adds nothing to the validity or effect of the instrument as between the parties. It "is only the mode provided by law for authenticating the act of the parties so as to entitle the

instrument to record and make it notice to subsequent purchasers, and to entitle it to be read in evidence without other proofs. If purchasers neglect to have their deeds properly authenticated and recorded, they will be liable to have their title divested by subsequent conveyances to innocent parties, and to the further inconvenience of being compelled to prove their execution when called upon to put them in evidence.”¹

Nature of Proof.

SECTION 14. It is usual to acknowledge instruments at the time of executing them, but under certain sections of our Civil Code the execution of conveyances, when not acknowledged, may be proved by the subscribing witnesses, and when the subscribing witnesses are dead or cannot be had, the end may be accomplished by proving the handwriting of the party and of the subscribing witnesses by other witnesses (see Proof of execution when not acknowledged, Secs. 32-38, *post*), and upon such proof the officer may make his certificate thereof and the instrument thereafter becomes entitled to record and to be read in evidence without further proof. It has been held that this may be done years after

(1) *Landers v. Bolton*, 26 Cal., 405

the actual making of the deed and even after the parties and witnesses to it are dead;² the law, however, protects innocent parties who have acquired rights in the meantime without notice.

Purpose of Acknowledgment or Proof.

SECTION 15. The purpose of acknowledgment is twofold: to enable the instrument to be recorded (see Acknowledgment necessary, Sec. 42, *post*; also see Purpose and Effect of Recording, Secs. 49-51, *post*), and to entitle it to be used as evidence without further proof. It is a rule of evidence that every instrument conveying or affecting real property, acknowledged or proved, and certified, as provided by law, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof.³ (See Record of Instrument may be used in evidence, Sec. 51, *post*.)

Private Writings May Be Acknowledged or Proved.

SECTION 16. Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances

(2) *Landers v. Bolton*, 26 Cal., 406

(3) Code of Civil Procedure, §1951

of real property, and the certificate of such acknowledgment or proof is *prima facie* evidence of the execution of the writing in the same manner as if it were a conveyance of real property.⁴

Authority to Take.—Disqualification.

SECTION 17. Acknowledgment or proof of an instrument may be made in this state, within the city, county, city and county, township or district for which the officer was elected or appointed, before either of several officers, one of which is a notary public.⁵ (See Jurisdiction, Sec. 7, *supra*.) A notary is, however, disqualified from taking an acknowledgment where he himself is the grantee or mortgagee in the instrument acknowledged. In such case the acknowledgment has been held to be void and of no effect.⁶ It is the general law that a party beneficially interested in an instrument is incapable of taking and certifying an acknowledgment of it. He is not, however, disqualified by reason merely of being the agent of a party to the instrument, if not pecuniarily interested in the transaction.⁷ Whether a notary who is a stockholder of a

(4) Code of Civil Procedure, §1948

(5) Civil Code, §1181

(6) *Lee v. Murphy*, 119 Cal., 370; *Murray v. Tulare, etc.*, 120 Cal., 311

(7) *Bank of Woodland v. Oberhaus*, 125 Cal., 320

corporation, has such an interest as to avoid an acknowledgment of the corporation taken before him, is not altogether clear, but such an acknowledgment seems to have been upheld in this state on the ground that the notary exercises merely ministerial, and not judicial powers. An instance of the exercise of quasi-judicial functions on the part of the notary, is where the law requires a privy examination of a married woman apart from her husband, but such law has not existed in this state since 1891.⁸ In the same case, the acknowledgment of a deed to a bank taken by a notary who was assistant cashier of the bank, was declared valid.

Mode of Taking Acknowledgments.

SECTION 18. *Identity of party must be ascertained.* The notary is required to know that the person who appears before him and makes the acknowledgment is the person described in and who executed the instrument, and if he does not know it he must require satisfactory evidence of that fact. Section 1185 of the Civil Code reads as follows:

“The acknowledgment of an instrument must not be taken, unless the officer taking it knows or has satisfac-

(8) First National Bank v. Merrill, 167 Cal., 396

tory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation, or other person who executed it on its behalf."

The importance of a strict compliance with the course prescribed by this section in the taking of acknowledgments has been declared by the supreme court in the case of *Joost v. Craig*, 131 Cal. 504, and by the appellate court in the case of *Homan v. Wayer*, 9 Cal. App. 123, and because of the emphasis with which this matter is treated in these cases, they are quoted from somewhat at length in the following section.

SECTION 19. *Liability on bond for failure to comply with statute.* In the case of *Joost v. Craig*, 131 Cal., 504, a deed was apparently executed and acknowledged properly, and the certificate of the notary stated that the person who acknowledged the execution of the instrument personally appeared before him and was known to him to be the person described in and who

executed the said instrument. The deed turned out to be a forgery. The plaintiff in the case accepted the deed and paid his money, relying solely on the certificate of the notary. In its opinion the supreme court uses the following language:

“He (the grantee) had a right to rely upon the certificate of the notary and to presume without question that such officer had done his duty. * * * The whole theory that the record of such instruments gives constructive notice of the contents of recorded instruments is founded upon the proposition that upon proper investigation the genuineness of such instruments has been determined. The certificate is also received as evidence in a trial in a court of law that the deed is genuine. If the deed is not genuine but is forged, the notary and his sureties ought to be held for all damages unless they have taken the precautions expressly required by the statute. The legislature has taken great care, though considering the importance of the matter, not too great, to make this certificate reliable. * * * The notary is expressly forbidden to

take the acknowledgment unless he knows that the person making the acknowledgment is the person described in the instrument. * * * If he did not know this it should have been proven by the oath of a credible witness, whose name must be stated. (C. C., Sec. 1189.) It is not enough that the person be introduced to the notary by a responsible person. If that were enough there would be no purpose in requiring the oath, for such person could always furnish the introduction. This point has been often decided though sufficiently obvious from the statute. To take an acknowledgment upon such introduction without the oath is negligence sufficient to render the notary liable in case the certificate turns out to be untrue. * * * The same matter was discussed in *State v. Meyer*, 2 Mo. App., 413. The court makes some suggestions as to what degree of acquaintance will authorize the notary to certify that he has personal knowledge, and also upon the proposition that an introduction, even by a responsible person, could not be relied upon, and says:

'It is obvious that when an officer taking an acknowledgment and making a certificate assumes any such fact, he does it at his own risk. The law warns him when he has not "personal knowledge" of his own to resort to certain observances which the law supposes to be sufficient in practice to prevent imposition. * * * But such a certificate is infinitely less liable to deceive or mislead than a declaration that the party making the acknowledgment is well known to the officer making the certificate. It puts all persons upon inquiry and furnishes a clue for conducting it; and it complies with the law.' This makes the certificate upon personal knowledge a guaranty of the genuineness of the instrument, and the court adds: 'It is perfectly idle for him to protest that he did not know or suspect that his certificate was false. That may be taken for granted, but is nothing to the purpose. His business was to know that it was true.'

"A notary may take all due precautions and fully comply with the statute and still be deceived. In such case he

would not be held liable, but if he has not fully complied with the statute, the rule announced above is not a whit too stringent.

“It may here be remarked that the witness by whose oath the execution of an instrument is proven when the person executing the instrument was not previously known to the officer, must himself be known to the notary. This is implied by the requirement that the officer shall certify that such person is a credible witness. When these necessary facts do not exist, the notary is expressly forbidden from taking the acknowledgment at all. When the notary does not obey this statute he should expect to be held liable. And I wish to repeat, these requirements are of great importance to the business world and not at all too exacting.”

This case further sets at rest the fact that notaries in taking acknowledgments act ministerially and not judicially. It appears that for judicial acts officers are not liable for either negligence or ignorance, but only for corrupt and intentional misconduct in the discharge of their

official duties; while, on the other hand, ministerial officers are liable in damages.

In the case of *Homan v. Wayer*, 9 Cal. App. 123, the grantor named in the deed was Mary E. Griswold, but the person who acknowledged the deed was not Mary E. Griswold but one who impersonated her in the execution and acknowledgment of the deed. To this deed the notary attached his certificate in the usual form wherein he certified "before me * * * personally appeared Mrs. Mary E. Griswold, a widow, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same." It was not contended by the notary that he knew the woman whom he certified to be Mary E. Griswold. His knowledge of her identity was gained by an introduction from a man whom he did not know, a re-assuring remark or two from this man, and an "oath" administered to the woman herself at the time of taking her acknowledgment. The court said:

"If we were permitted to consider the so-called 'oath' of the woman as proof or evidence upon which the notary could base his certificate, it did not establish the things which he is required to know and certify. The essential fact to be

known by, or proven to, the notary is that the person making the acknowledgment is the person described in and who executed the instrument. The woman who executed the deed was asked if her name was Mary E. Griswold and if she was the sole owner of the property. Her name might have been Mary E. Griswold, and she not the person described in the deed. The notary is not required to certify to the ownership of the property * * * and this only indirectly bore upon the matter to be certified. The purpose of the certificate is to establish the identity of the grantor and the genuineness of the signature to the deed. * * *

“A certificate of personal knowledge is not justified by swearing the person who executed the instrument or any other person. The statute draws a distinction between those ‘known’ and those ‘proven to be’ the individual described in the instrument. In the former case no taking of testimony and no ‘satisfactory evidence’ is required; it is sufficient that the officer knows. If the officer does not ‘know,’ then the law

makes it his duty to inform himself by satisfactory evidence on the oath or affirmation of a credible witness. In this event he is called upon to certify by whose oath it was proven to him that the person whose acknowledgment was taken is the person described in the instrument. * * *

“This is not a case where a mistake was made through inadvertence, or one in which due precaution was taken, the statute fully complied with, and still the notary was deceived. It is not within the exception stated in the Joost-Craig case, but comes clearly within the rule of law declared in the case of *State v. Meyer*, 2 Mo. App. 413, therein cited. * * *

The evidence in this case showed that the plaintiff relied upon the false certificate of the notary. The various defenses made on behalf of the defendant, namely: That there was a conspiracy to defraud the owner, that the neglect of the notary was not the proximate cause of the injury, and that there was no privity of contract between the notary and the person injured, were of no avail, and it was held that the loss sustained

was the result of official misconduct or neglect for which the notary and his sureties were liable.

The case of *Kleinpeter v. Castro*, 11 Cal. App. 83, is another case where a notary made a false certificate of acknowledgment of a forged deed and was held liable on his official bond for all damages sustained.

SECTION 20. *Introduction by third party not sufficient.* In addition to what has been said with respect to mere introduction by third party in the preceding section, see also *Hatton v. Holmes*, 97 Cal., 212, wherein the supreme court says that a notary has no right, in disregard of the plain provision of the statute, to certify that he knows a person whom he does not know on the mere introduction of some third party, and if he does so, and loss results therefrom, he renders himself and his sureties liable to make good the loss. This case further holds, however, that this liability does not extend to a case where the negligence of the losing party is the proximate cause of the loss.

SECTION 21. *Negligence of injured party excuses notary.* Should the injured party have taken the impostor before and introduced him to the notary and requested the notary to certify to the acknowledgment and execution of the deed

by the impostor, in such case, while the officer would not have been justified, he would have been guilty of contributory negligence only.. For cases in which the negligence of the notary was not the direct or proximate cause of the loss and he was therefore held not liable, see *Bank of Savings v. Murfey*, 68 Cal., 455; *Over-acre v. Blake*, 82 Cal., 77.

SECTION 22. *Witness swearing falsely may be prosecuted.* We have another case (*In re Carpenter*, 64 Cal., 271) where a person appeared before the notary for the purpose of acknowledging a deed, and the notary being unacquainted with him, administered an oath to him as a witness in his own behalf for the purpose of ascertaining if he was the person who signed the deed he wished to acknowledge. Upon that evidence the notary took the acknowledgment, certified to it and returned the deed with his certificate annexed to the person making it. The court held that such party was a competent witness in his own behalf in the proceedings before the notary and when he testified falsely on the oath administered to him by the notary, he subjected himself to prosecution for perjury.

(9) *Joost v. Craig*, 131 Cal., 510

Acknowledgment by Married Women.

SECTION 23. A conveyance by a married woman has the same effect as if she were unmarried and may be acknowledged in the same manner.¹⁰ This is now the law. Formerly (prior to 1891) it was necessary that a married woman should be examined and made acquainted with the contents of the instrument apart from her husband, and consequently a separate form of certificate was necessary in case of acknowledgment by a married woman. That law being repealed, the general form of certificate is now used.

Certificate of Acknowledgment.

SECTION 24. *Notary must attach.* A notary taking the acknowledgment of an instrument must indorse thereon or attach thereto his certificate of acknowledgment.¹¹ The form of the certificate is prescribed by law and a substantial compliance therewith is required. It is, of course, well to follow the form prescribed with exactness. However, where a certificate of acknowledgment was objected to because the officer certified that the grantor "acknowledged to me" the execution of the instrument (the

(10) Civil Code, §1187

(11) Civil Code, §1188

words "to me" not being a part of the statutory form), the variation was declared immaterial. Again, where a foreign notary certified that the grantor "appeared before me, being personally known to me to be the same person described in and who executed the foregoing instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned," this was held to be a substantial compliance with the requirements of our statute.¹²

SECTION 25. *General form of.* The general form of certificate of acknowledgment is as follows:

"State of ———, County of ———, ss.

"On this ——— day of ———, in the year ———, before me (here insert name and quality of the officer), personally appeared ———, known to me (or proved to me on the oath of ———) to be the person whose name is subscribed to the within instrument, and acknowledged that he (she or they) executed the same."¹³

Appendix Forms Nos. 1, 2 and 3.]

(12) *Holland v. Hotchkiss*, 162 Cal., 376-7

(13) Civil Code, 1189

SECTION 26. *Form of, when acknowledgment is by corporation.*

"State of ———, County of ———, ss.

"On this ——— day of ———, in the year ———, before me (here insert the name and quality of the officer), personally appeared ———, known to me (or proved to me on the oath of ———) to be the president (or the secretary) of the corporation that executed the within instrument (where, however, the instrument is executed in behalf of the corporation by some one other than the president or secretary) insert known to me (or proved to me on the oath of ———) to be the person who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same." ¹⁴

[Appendix Forms Nos. 4, 5 and 6.]

Prior to the amendment of 1905 a conveyance by a corporation could only be acknowledged by its president or secretary.

SECTION 27. *Form of, when acknowledgment is by attorney in fact.*

"State of ———, County of ———, ss.

"On this ——— day of ———, in the year ———, before me (here insert the name and qual-

(14) Civil Code, §1190

ity of the officer), personally appeared ———, known to me (or proved to me on the oath of ———) to be the person whose name is subscribed to the within instrument as the attorney in fact of ———, and acknowledged to me that he subscribed the name of ——— thereto as principal, and his own name as attorney in fact.”¹⁵

[Appendix Form No. 7.]

SECTION 28. *When acknowledgment is taken outside of state.* It is expressly provided that any acknowledgment taken without this state in accordance with the laws of the place where the acknowledgment is made, shall be sufficient in this state; *and further*, that the certificate of the clerk of a court of record of the county or district where such acknowledgment is taken, that the officer certifying to the same is authorized by law so to do, and that the signature of the said officer to such certificate is his true and genuine signature, and that such acknowledgment is taken in accordance with the laws of the place where the same is made, shall be *prima facie* evidence of the facts stated in the certificate of said clerk.¹⁶

(15) Civil Code, §1192

(16) Civil Code, §1189

The provision of the foregoing section in regard to certificates of the clerk, is only applicable to cases where the certificate of the foreign notary does not show an acknowledgment which would be good under our own statutes.¹⁷

When an acknowledgment is taken in this state for the purpose of being used outside of the state, such certificate of the clerk should generally be attached.

SECTION 29. *Venue—Name and quality of officer.* "State of ———, County of ———, ss." at the head of the certificate is a part of the certificate as prescribed by law. The purpose of the venue is to show that the official act was done within the territorial jurisdiction of the officer. In the case of *Emeric v. Alvarado*, 90 Cal., 463, a certificate is commented on in which the venue was missing and the name and quality of the officer in the body of the certificate was left blank, and it was held that the certificate was fatally defective because it did not appear therefrom in what county or state the acknowledgment was taken. In this connection the court said: "Defects in certificates of acknowledgment should be usually overlooked as much as possible, but in this case the defect is so radical that,

(17) *Holland v. Hotchkiss*, 162 Cal., 377

so far as we can see, to condone it would not be in the interest of justice." In the same case (*Id.*, p. 478) another certificate is commented on which showed the venue in the City and County of San Francisco and the official seal of the notary attached showed that he was not a notary public in and for the City and County of San Francisco, but for the county of Contra Costa. The court found that the material statements in the certificate were not true and it was insufficient on its face.

SECTION 30. *Signature, name of office and seal.* It is further required that officers taking and certifying acknowledgments or proof of instruments for record, must authenticate their certificates by affixing thereto their signatures, followed by the names of their offices, and also their seals of office.¹⁸ The proper official name of a notary is "Notary Public in and for" the county for which he was appointed. In *Duckworth v. Watsonville etc. Co.* 150 Cal. 521, the certificate of acknowledgment to a deed recited the name and official character of the notary as a notary public in and for the county named, in the usual form, but was signed by him merely with the words "Notary Public" after his signature, and it

(18) Civil Code, §1193

was objected that this was not a sufficient statement of the name of his office. The court held, however, in view of the statement made in the body of the certificate, that the name of the office was sufficiently stated after the signature.

SECTION 31. *When not conclusive.* A certificate of acknowledgment is *prima facie* evidence of the fact of acknowledgment; that is, evidence which suffices for proof until contradicted and overcome by other evidence. It is therefore not conclusive and may be impeached by parol evidence that the person named therein never in fact appeared before the notary certifying to the acknowledgment. If such is the case the act of the officer is wholly void and the certificate is nothing but a fabrication. So held in *Le Mesnager v. Hamilton*, 101 Cal., 532. In this case the certificate of the notary showed upon its face that the instrument was duly acknowledged by one of the parties to it who was a married woman, when, in fact, she had never appeared before the notary for the purpose of acknowledging it. A distinction is made between a case of this kind where the officer is entirely without authority and his certificate is void *in toto*, and one where the party actually appeared before the notary and made some kind of ac-

knowledge, and an attempt is made to attack the certificate because of some defect in the manner of acknowledgment. Such a case would come within the rule which makes the certificate of acknowledgment conclusive in favor of an innocent purchaser in good faith and who has relied on the truth of the certificate.¹⁹

Proof of Execution When Not Acknowledged

SECTION 32. *How made.* Proof of the execution of an instrument when not acknowledged may be made, either (1) by the party executing it, or either of them; (2) by a subscribing witness; or (3) by other witnesses, who, under certain conditions are permitted to testify to the handwriting of the party or subscribing witness.²⁰ (See Handwriting, when may be proved, Secs. 35-36, *post.*)

SECTION 33. *Subscribing witness defined.* A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness.²¹

SECTION 34. *By Subscribing Witness, requisites of.* If proof of the execution of an instrument is made by a subscribing witness, such wit-

(19) *De Arnaz v. Scandon*, 59 Cal., 486

(20) Civil Code, §1195

(21) Code of Civil Procedure, §1935

ness must be personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or must be proved to be such by the oath of a credible witness.²² And the subscribing witness must prove that the person whose name is subscribed to the instrument as a party, is the person described in it, and that such person executed it, and that the witness subscribed his name thereto as a witness.²³

[Appendix Form No. 8.]

SECTION 35. *By Handwriting, when may be made.* The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, in the following cases:

1. When the parties and all the subscribing witnesses are dead; or
2. When the parties and all the subscribing witnesses are non-residents of the state; or
3. When the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due diligence; or
4. When the subscribing witness conceals himself, or cannot be found by the officer by the

(22) Civil Code, §1196

(23) Civil Code, §1197

exercise of due diligence in attempting to serve the subpoena or attachment; or

5. In case of the continued failure or refusal of the witness to testify for the space of one hour after his appearance.²⁴ (See Mode of recording when execution has been established by proof of handwriting, Sec. 48, *post*.)

In *Follmer v. Rohrer*, 158 Cal. 759, the point was made that the deed in question, being neither acknowledged nor witnessed, was not an instrument "entitled to be proved for record" and that the plaintiffs had not, therefore, shown their right under section 1203 of the Civil Code (see Section 40, *post*) to a "judgment proving such instrument." The court there held that under the foregoing section providing that "the execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, *if there is one*, in the following cases: 1. When the parties and all the subscribing witnesses are dead; * * * " the subscription of a witness is not necessary to the validity of a deed, and the language of the section last quoted carries the clear implication that where there is no such witness, proof of the handwriting of the party executing is sufficient.

(24) Civil Code, §1198

SECTION 36. *What must be proved by evidence of handwriting.* The evidence taken under the preceding section must satisfactorily prove to the officer the following facts:

1. The existence of one or more of the conditions mentioned therein; and

2. That the witness testifying knew the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with his signature, and that it is genuine; and

3. That the witness testifying personally knew the person who subscribed the instrument as a witness, and is well acquainted with his signature, and that it is genuine; and

4. The place of residence of the witness.²⁵

[Appendix Forms Nos. 9, 10 and 11.]

SECTION 37. *Powers of officer taking proof.* Officers authorized to take the proof of instruments are authorized in such proceedings:

1. To administer oaths or affirmations.
2. To employ and swear interpreters.
3. To issue subpœna.
4. To punish for contempt.²⁶

(25) Civil Code, §1199

(26) Civil Code, §1201

Certificate of Proof.

SECTION 38. An officer taking proof of the execution of any instrument must, in his certificate indorsed thereon or attached thereto, set forth all the matters required by law to be done or known by him, or proved before him on the proceeding, together with the names of all the witnesses examined before him, their places of residence respectively, and the substance of their testimony.²⁷

Defective Certificates.

SECTION 39. *Notary may not correct.* It is the duty of the notary to take the acknowledgment and certify it as a part of the same transaction. After taking the acknowledgment and making and delivering the return, he is discharged from all further authority over the subject.²⁸ Therefore, if he has made a false or defective certificate he cannot alter or amend it.

SECTION 40. *Action to amend.* But what he cannot do can be done under the provisions of Sections 1202 and 1203 of the Civil Code, which provide that when the acknowledgment or proof of the execution of an instrument is properly made but defectively certified, any party inter-

(27) Civil Code, §1200

(28) Bours v. Zachariah, 11 Cal., 281

ested may have an action in the superior court to obtain a judgment correcting the certificate;²⁹ and any person interested under an instrument entitled to be proved for record, may institute an action in the superior court against the proper parties to obtain a judgment proving such instrument.³⁰ A deed, although it is neither acknowledged nor witnessed, is an instrument entitled to be proved for record.³¹

SECTION 41. *Judgment attached to instrument may be recorded.* A certified copy of such a judgment showing the proof of the instrument and attached thereto, entitles such instrument to record with like effect as if acknowledged.³²

(29) Civil Code, §1202

(30) Civil Code, §1203

(31) Follmer v. Rohrer, 158 Cal. 755.

(32) Civil Code, §1204

CHAPTER III.

RECORDING OF INSTRUMENTS.

- §42 Acknowledgment necessary.
- 43-45 What may be recorded without acknowledgment.
- 46-48 Mode of recording.
- 49-51 Purpose and effect of recording.
- 52 Effect of failure to record.
- 53 Unrecorded instrument, when valid.
- 54 Instruments to be acknowledged and recorded.

Acknowledgment Necessary.

SECTION 42. Any instrument affecting the title to or possession of real property may be recorded—unless it belongs to one of the classes expressly excepted from the rule (see What may be recorded without acknowledgment, Secs. 43-45, *post*)—when and only when its execution has been acknowledged by the person executing it, or, if executed by a corporation, by its president or secretary or other person executing it on behalf of the corporation, or proved by a subscribing witness, or the execution established by proof of the handwriting, and the acknowledgment or proof certified as prescribed by law and as set forth in the foregoing chapter.¹ The stat-

(1) Civil Code, §§1158, 1161

ute is mandatory and these steps must be taken before an instrument can be recorded.

What May Be Recorded Without Acknowledgment.

SECTION 43. *Judgments.* Judgments affecting the title to or possession of real property authenticated by the certificate of the clerk of the court in which such judgments were rendered (and notices of location of mining claims) may be recorded without acknowledgment or further proof.² Also, as we have seen, a judgment obtained in an action brought for the purpose of correcting a defective certificate of acknowledgment, when attached to the instrument, entitles the same to record. (See Judgment attached to instrument may be recorded, Sec. 41, *supra*.)

SECTION 44. *Letters patent.* Letters patent from the United States or from the state of California, executed and authenticated pursuant to existing law, may be recorded without acknowledgment or further proof.³ This refers only to the recording of letters patent affecting real property; letters patent for an invention are, of course, not entitled to record.

(2) Civil Code, §1159

(3) Civil Code, §1160

SECTION 45. *Certificates of residence.* Any person, firm, or corporation, may record in the office of the county recorder of any county in the state of California a certificate setting forth the name of said person, firm, or corporation, and the place of residence of said person, firm, or corporation, and the place where service of summons may be made upon said person, firm, or corporation. The said certificate must be verified by the oath of the person, or of a member of the firm, or officer of the corporation making the same, and may be recorded without acknowledgment. Such person, firm, or corporation may upon a change of place of residence file affidavit as herein provided and such last affidavit filed shall be the place designated as the place where service of summons may be made as herein provided. The fee of the recorder for recording said certificate shall be fifty cents; and the recorder shall keep in his office an index entitled "Index to Certificates of Residence," in which must be entered the name of the person, firm, or corporation in whose behalf said certificate was filed.⁴

(4) Civil Code, §1163

Mode of Recording.

SECTION 46. *Instrument must be recorded where.* The instrument must be recorded in the office of the county recorder of the county in which the real property affected is situated. The different classes of instruments are recorded in different sets of books.⁵

SECTION 47. *When deemed recorded.* The instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited with the proper officer for record.⁶ The time of recording is endorsed on the instrument when deposited, and is important, as it gives constructive notice from the moment it is filed with the recorder. (See Constructive notice, Sec. 49, *post.*)

SECTION 48. *When execution is established by proof of handwriting.* When the execution of an instrument is established by proof of handwriting (see Proof by handwriting when may be made, Secs. 35, 36), the instrument, though properly proved and certified according to law, may only be recorded in the proper office if the original is at the same time deposited therein to remain for public inspection.⁷

(5) Civil Code, §§1169, 1171

(6) Civil Code, §1170

(7) Civil Code, §1162

Purpose and Effect of Recording.

SECTION 49. *Constructive notice.* Every conveyance of real property, acknowledged or proved, and certified and recorded, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees;⁸ and such notice is conclusive, except that it has been held that this language only contemplates conveyances by persons having title, and does not apply to a deed by a stranger.⁹ Until so filed for record the instrument is void as against subsequent *bona fide* purchasers or mortgagees without notice. (See effect of Failure to Record, Sec. 52, *post*, and Unrecorded Instrument, when valid, Sec. 53, *post*.)

SECTION 50. *Certified copy may be recorded in another county.* A certified copy of any such recorded conveyance may be recorded in any other county, and when so recorded the record thereof shall have the same force and effect as though it was of the original conveyance, and where such original conveyance has been recorded in any county wherein the property therein mentioned is not situated, a certified copy of

(8) Civil Code, §1213

(9) Bothin v. Cal. Title Ins. Co. 153 Cal. 724

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such recorded conveyance may be recorded in the county where such property is situated with the same force and effect as if the original conveyance had been recorded in such county.¹⁰

SECTION 51. *Record of instrument may be used in evidence.* It is further provided that the original record of such conveyance or instrument, acknowledged or proved and certified as provided by law, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence on a trial in court with like effect as the original instrument, without further proof.¹¹

Effect of Failure to Record.

SECTION 52. Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action, and the term "conveyance" as used here, embraces every instrument in writing by which

(10) Civil Code, §§1213, 1218.

(11) Code of Civil Procedure, §1951

any estate or interest in real property is created, aliened, mortgaged or encumbered.¹¹

Consequently, a deed of land executed prior to a mortgage of the same land to another party, but recorded after the mortgage, is subject and subsequent to the mortgage if the mortgagee took in good faith, for value, and without actual notice of the deed;¹² and a subsequent mortgage first recorded, takes precedence over a prior unrecorded mortgage, if taken in good faith and for a valuable consideration, without notice.¹³

Unrecorded Instrument, When Valid.

SECTION 53. An unrecorded instrument is valid, as between the parties thereto and those who have notice thereof.¹⁴ Therefore, a purchaser with notice of another's claim cannot take advantage of the fact that the conveyance under which the other claims was not recorded.¹⁵ The rule as to what constitutes notice is, that notice of facts sufficient to put one upon inquiry is notice of all the facts to which inquiry would lead. Hence, possession is notice to all the world of the holder's rights, and it has been held that one who

(11) Civil Code, §§1214, 1215; Warnock v. Harlow, 96 Cal., 306

(12) Emeric v. Alvarado, 90 Cal., 444

(13) Odd Fellows' Sav. Bk. v. Bouton, 46 Cal., 605

(14) Civil Code, §1217

(15) Robinson v. Muir, 151 Cal. 122

purchases land in the possession of a third person, has no right to rely on the record title alone in making the purchase, but is bound to look beyond the record title for the purpose of ascertaining what rights, if any, the party in possession has in the premises.¹⁶ In another case, where a person about to make a loan and take a mortgage upon land as security employed an agent to make the negotiation, a declaration made by a tenant in possession to the agent that another person had an interest in the land, was sufficient to put the mortgagee on inquiry, and if he failed to make such inquiry, the mortgage was subject to the rights of such other person in the land even though the paper title appeared to be in the mortgagor.¹⁷

Instruments to be Acknowledged and Recorded.

SECTION 54. As one of the duties of notaries (see Duties, Sec. 5, sub. 2, *supra*) is, "to take the acknowledgment or proof of powers of attorney, mortgages, deeds, grants, transfers, and other instruments of writing, executed by any person, and to give a certificate of such proof or acknowledgment indorsed on or attached to the instrument," and as such officers are frequently

(16) *Security, etc. Co. v. Willamette, etc. Co.*, 99 Cal., 636; *Pollard v. Rebman*, 162 Cal., 633; *Shurtleff v. Kehrler*, 163 Cal., 24

(17) *Bauer v. Pierson*, 46 Cal., 293

called upon to draw these instruments, as well as constantly required to handle them, the next three chapters on deeds, mortgages, and homesteads will set forth the general law governing these instruments.

- CHAPTER IV.

DEEDS.

- §55 Definitions.
- 56 Must be in writing.
- 57-61 Form and contents of.
- 62-65 Execution.
- 66-68 Power of attorney.
- 69-72 Delivery.
- 73 Interpretation of.
- 74-77 Effect of.
- 78 Instrument made with intent to defraud, when void.

Definitions.

SECTION 55. A deed is a written instrument executed and delivered, by which the title and possession of real property is transferred from one person to another. It is described in the Civil Code as a "grant of an estate in real property." A "grant, bargain and sale" deed is, as the name implies, a grant by way of bargain and sale. This form of deed imports a transfer and delivery of property by one person to another for a consideration agreed upon between them as the value of the property, and the words "grant, bargain and sell" imply a general warranty that the grantor has done no act by which the estate conveyed by him can be defeated. (See Implied covenants, Sec. 77, *post.*) A "gift"

deed is a voluntary transfer of property without any consideration or compensation. The consideration recited in the established form of gift deed is, "love and affection which the party of the first part has and bears unto the party of the second part, as also for the better maintenance, support, protection and livelihood of the party of the second part." A "quit-claim" deed only purports to pass whatever title, or apparent title, the grantor has in the property conveyed. By a "warranty" deed the grantor warrants and agrees to defend the title. A conveyance may be to a person in trust, for the purpose of performing certain specified acts, and the instrument is then called a "deed of trust."

Must Be in Writing.

SECTION 56. An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing.¹

Under the statute of frauds, any agreement that by its terms is not to be performed within a year from the making thereof, is invalid unless put in writing,² and the supreme court has held

(1) Civil Code, §1091

(2) Civil Code, §1624, sub. 1

that if the time from the making of the agreement to the end of its performance exceeds a year ever so little, this statute applies, and consequently an oral lease for one year to commence *in futuro* is void.³ An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission must also be in writing.⁴

Form and Contents of.

SECTION 57. *Code form.* The code form of a grant of real property is as follows:

“I, A B, grant to C D all that real property situated in (insert name of county) county, state of California, bounded (or described) as follows: (here insert description, or if the land sought to be conveyed has a descriptive name, it may be described by the name, as, for instance, ‘The Norris Ranch’).

“Witness my hand, this (insert day) day of (insert month), 19—. A B.”⁵

It is customary in drawing deeds to use the printed forms which are in common use, and which are generally safe. It is then only neces-

(3) Wickson v. Monarch Cycle Mfg. Co., 128 Cal., 153

(4) Civil Code, §1624, Sub. 6

(5) Civil Code, §1092

sary to fill in the date, parties, consideration and description of property.

SECTION 58. *Parties.* The parties to the instrument should be named and described. A deed which does not contain the name of the grantee would be void as a conveyance. If the grantee is misnamed the grantor cannot by a subsequent deed correct an error in the grantee's name.⁶ Furthermore, a deed is void unless the grantee named is a person, either natural or artificial, capable of taking the property conveyed;⁷ hence, a deed to the estate of a deceased person is a nullity, as the estate cannot be recognized as a party to a contract.⁸ Neither should there be any variance between the name of the grantor as it appears in the body of the deed and the signature. In case the grantor has, since acquiring the property, changed his or her name from any cause, the conveyance should set forth the name in which the title to the property stands as well as his or her present name.⁹

SECTION 59. *Consideration.* A consideration need not be expressed in a deed. It is usual to recite a consideration, however, even though it

(6) *Walters v. Mitchell*, 6 Cal. App. 410

(7) *Rixford v. Zeigler*, 150 Cal., 435

(8) *Simmons v. Spratt*, 1 So. (Fla.), 860; *McInerney v. Beck*, 39 Pac. (Wash.), 130

(9) Civil Code, §1096

be a nominal one. In this state a written instrument is presumptive evidence of a consideration. Either party may show what the real consideration was.

SECTION 60. *Words of inheritance.* Words of inheritance or succession are not requisite to transfer a fee in real property,¹⁰ but they, too, are usually inserted.

SECTION 61. *Description of property.* Great care should be taken to have the description of property minute and accurate. An error in the description is sure to cause future annoyance and trouble. Should an error inadvertently be made in the description it can be corrected by a subsequent deed between the same parties. In such subsequent deed a statement, showing the purpose of the deed, should be inserted after the habendum clause; as, for instance, "This deed is made for the purpose of correcting an error in the description of property contained in that certain deed (describing it), and to make such description more definite and certain." As before stated, however, a correction deed cannot be used to correct an error in the grantee's name. (See Parties, Sec. 58, *ante*.)

(10) Civil Code, §1072

Execution.

SECTION 62. *In general.* The deed should be subscribed by the grantor, and when subscribed should be acknowledged as provided in the chapter on "Acknowledgment and Proof of Instruments."

SECTION 63. *By person who cannot write.* The word "signature" or "subscription" includes mark, and when a person cannot write, he may make his mark and his name may be written near it by a person who writes his own name as a witness. It is provided, however, that when a signature is by mark, it must, in order that the same may be acknowledged or may serve as the signature to any sworn statement, be witnessed by two persons who must subscribe their own names as witnesses thereto.¹¹ This applies to all written instruments, and notaries are frequently called upon to sign for and take the acknowledgment of persons who cannot write. It is usual in such cases to make the statement that "———, being unable to write his name, has made his mark, and I, at his request and in his presence, have written his name for him near his mark, and now sign my own name as a witness," and have the same attested by two other witnesses.

(11) Code of Civil Procedure, §17

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SECTION 64. *By attorney in fact.* When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact.¹² (See Power of attorney, Secs. 66-68, *post.*)

SECTION 65. *By married women.* A grant or conveyance of real property made by a married woman may be made, executed, and acknowledged in the same manner and has the same effect as if she were unmarried.¹³

Power of Attorney.

SECTION 66. *Defined.* "Power of attorney" indicates that a power or authority is conferred. It is an instrument by which the authority of one person to act in the place and stead of another is set forth. It must be in writing, subscribed, acknowledged or proved, certified and recorded. A general power of attorney confers power to act generally; a special power of attorney confers power to perform some particular act.

SECTION 67. *By married women.* A married woman may make, execute, and revoke powers of attorney for the sale, conveyance, or en-

(12) Civil Code, §1095

(13) Civil Code, §1093

cumbrance of her real or personal estate, which shall have the same effect as if she were unmarried, and may be acknowledged in the same manner as a grant of real property.¹⁴

SECTION 68. *Revocation of.* No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved and certified, and recorded in the same office in which the instrument containing the power was recorded.¹⁵

Delivery of Deed.

SECTION 69. *Necessity of.* A grant takes effect so as to vest the interest intended to be transferred, only upon its delivery by the grantor.¹⁶ Delivery is essential to give the conveyance legal effect, and a valid delivery is only made when the conduct and acts of the grantor manifest a present intent to dispose of the title conveyed. A delivery merely for the purpose of safe keeping or custody is not such a delivery.¹⁷ Further, a deed cannot be delivered conditionally.

(14) Civil Code, §1094

(15) Civil Code, §1216

(16) Civil Code, §1054

(17) Follmer v. Rohrer, 158 Cal., 755

Delivery to the grantee, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon.¹⁸ A grant duly executed is presumed to have been delivered at its date.¹⁹ It is well settled that delivery is not complete until the grantor has so dealt with the instrument that he has lost all control over it. Therefore, if a person should make a deed and duly acknowledge it before a notary public, but keep it in his possession and die without having delivered it, the deed is of no effect. (See Redelivery, Sec. 72, *post*.)

SECTION 70. *In Escrow.* The law provides for the delivery of a deed in escrow, thus: A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in the possession of the third person, and subject to condition, it is called an escrow.²⁰ On the performance of the condition it becomes incumbent on the depositary to make delivery. The grantor must have intended to part with the possession for all time, and cannot revoke it after delivery in escrow.²¹

(18) Civil Code, §1056

(19) Civil Code, §1055

(20) Civil Code, §1057

(21) McDonald v. Huff, 77 Cal., 279

SECTION 71. *Constructive delivery.* Though a deed be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:

1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or

2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed.²²

SECTION 72. *Redelivery.* Redelivering a grant of real property to the grantor, or canceling it, does not operate to retransfer the title.²³ It can only be retransferred by an instrument as formal as the one transferring it.

Interpretation of.

SECTION 73. In the construction of a deed the understanding and intention of the parties should be ascertained, and for this purpose the whole of the instrument should be considered.²⁴ A clear and distinct provision in a grant is not controlled by other words less clear and distinct. If the operative words of a grant

(22) Civil Code, §1059

(23) Civil Code, §1058

(24) Stockton v. Weber, 98 Cal., 433

are doubtful, recourse may be had to its recitals to assist the construction.

It is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.

If several parts are absolutely irreconcilable, the former part prevails.

Where a future interest is limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be taken to mean successors, or issue living at the death of the person named as ancestor.²⁵

Effect of.

SECTION 74. *What passes.* A fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended. Where a person purports by proper instrument to convey real property in fee simple, without expressly restricting the conveyance to any particular interest therein, and subsequently acquires any title, or claim of title thereto, the same passes by opera-

(25) Civil Code, §§1067-1071; Pavkovich v. S. P. R. R. Co. 150 Cal. 45

tion of law to the grantee, or his successors.²⁶ Even if the grantor had no title whatever to land at the time he executed a grant, bargain, and sale deed of it purporting to convey the fee, any title he afterwards acquired would pass to his grantee under such deed.²⁷ This is not true of a quit-claim deed. As a rule, a quit-claim deed does not carry after-acquired title. A grant made by the owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer.²⁸ A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.²⁹ A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center

(26) Civil Code, §§1105, 1106

(27) *Cecil v. Gray*, 170 Cal., 137

(28) Civil Code, §1108

(29) Civil Code, §§1104, 1084

thereof, unless a different intent appears from the grant.³⁰ Where a grant is made upon condition subsequent, and is subsequently defeated by the non-performance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant duly acknowledged for record. An instrument purporting to be a grant of real property, to take effect upon condition precedent, passes the estate upon the performance of the condition.³¹

SECTION 75. *As to tenants.* Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenants; but no tenant who, before notice of the grant, shall have paid rent to the grantor must suffer any damage thereby.³²

SECTION 76. *How far conclusive.* Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded.³³ (See Effect of failure to record, Sec. 52, *supra*.)

(30) Civil Code, §1112

(31) Civil Code, §§1109, 1110

(32) Civil Code, §1111

(33) Civil Code, §1107

SECTION 77. *Implied covenants.* From the use of the word "grant" in any conveyance by which an estate of inheritance or fee-simple is to be passed, the following covenants, and none other, on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance:

1. That, previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee.

2. That such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or any person claiming under him.

Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.³⁴

Instrument Made with Intent to Defraud, When Void.

SECTION 78. Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior

(34) Civil Code, §1113

or subsequent purchasers thereof, or encumbrancers thereon, is void as against every purchaser or encumbrancer, for value, of the same property, or the rents or profits thereof. But no instrument is to be avoided hereunder in favor of a subsequent purchaser or encumbrancer having notice thereof at the time his purchase was made, or his lien acquired, unless the person in whose favor the instrument was made was privy to the fraud intended.³⁵

(35) Civil Code, §§1227, 1228

CHAPTER V.

MORTGAGES.

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Nature of Mortgages in General.

SECTION 79. Mortgage as defined by the Civil Code, is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession. It conveys no title, but gives only the security of a lien upon property. It may be created upon property held adversely to the mortgagor. It can be created, renewed or extended only by

writing executed with the formalities required in the case of a grant of real property. The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession.¹ It is a lien on everything that would pass by a grant of the property.² It does not bind the mortgagor personally to perform the act for the performance of which it is security, unless there is an express covenant to that effect. Title acquired by the mortgagor subsequent to the execution of the mortgage enures to the mortgagee as security for the debt in like manner as if acquired before the execution. The person whose interest in the property is subject to the lien of a mortgage may not do any act to impair the mortgagee's security.³

Possession of the Property.

SECTION 80. A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration.⁴

(1) Civil Code, §§2920-2923

(2) Civil Code, §2926

(3) Civil Code, §§2928-2930

(4) Civil Code, §2927

The instrument is required to be recorded, in order to give notice to subsequent purchasers or mortgagees, and the recording of the instrument is substituted in place of the change of possession. A change of possession of personal property mortgaged, would change it into a pledge.

Transfer When a Mortgage.

SECTION 81. Every transfer of an interest in property, other than in trust, made only as security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is deemed a pledge.⁵

Consequently, a deed absolute on its face, if made as security for the payment of a debt, is in reality a mortgage, and the fact that a transfer was made subject to defeasance on a condition may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or encumbrancer for value and without notice), though the fact does not appear by the terms of the instrument.⁶ (See When grant of real property is recorded as mortgage. Sec. 90, *post*.)

(5) Civil Code, §2924

(6) Civil Code, §2925

Foreclosure.

SECTION 82. A mortgage is usually given as security for a debt, and the debt is evidenced by a promissory note, copy of which is usually inserted in the mortgage. If the debt is not paid in accordance with the terms of the note, the mortgagee may foreclose the mortgage in the manner prescribed by law. A power of sale may be conferred by the mortgagor upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is security.⁷

Power of Attorney to Execute.

SECTION 83. A power of attorney to execute a mortgage must be in writing, subscribed, acknowledged or proved, certified and recorded, in like manner as powers of attorney for grants of real property.⁸

Assignment of Debt.

SECTION 84. The assignment of a debt secured by a mortgage, carries with it the security.⁹

(7) Civil Code, §§2931, 2932

(8) Civil Code, §2933

(9) Civil Code, §2936

Record of Assignment of Mortgage.

SECTION 85. An assignment of a mortgage may be recorded in like manner as a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor.

When the mortgage is executed as security for money due, or to become due, on a promissory note, bond, or other instrument, designated in the mortgage, the record of the assignment of the mortgage is not, of itself, notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the person holding such note, bond, or other instrument.¹⁰

How Discharged of Record.

SECTION 86. A recorded mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the recorder, who must certify the acknowledgment in form substantially as

(10) Civil Code, §§2934, 2935

follows: "Signed and acknowledged before me, this ——— day of ———, in the year ———.

A. B., Recorder."

A recorded mortgage, if not discharged as above provided, must be discharged upon the record by the officer having custody thereof, on the presentation to him of a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged or proved and certified as prescribed by the chapter on recording transfers, stating that the mortgage has been paid, satisfied, or discharged.

Foreign executors and administrators may satisfy mortgages upon the records of any county in this state, upon producing and recording in the office of the county recorder of the county in which such mortgage is recorded, a duly certified and authenticated copy of their letters testamentary or of administration, and which certificate shall also recite that said letters have not been revoked.

A certificate of the discharge of a mortgage, and the proof or acknowledgment thereof, must be recorded at length, and a reference made in the record to the book and page where the mortgage is recorded, and in the minute of the discharge made upon the record of the mortgage

to the book and page where the discharge is recorded.¹¹ (See Satisfaction of mortgages, Sec. 87, *post.*)

Satisfaction of Mortgages.

SECTION 87. When any mortgage has been satisfied, the mortgagee or his assignee must immediately, on demand of the mortgagor, execute, acknowledge, and deliver to him a certificate of the discharge thereof, so as to entitle it to be recorded, or he must enter satisfaction, or cause satisfaction of such mortgage to be entered of record, and any mortgagee, or assignee of such mortgagee, who refuses to execute, acknowledge, and deliver to the mortgagor the certificate of discharge, or to enter satisfaction, or cause satisfaction of the mortgage to be entered, as provided in this chapter, is liable to the mortgagor, or his grantee or heirs, for all damages which he or they may sustain by reason of such refusal, and shall also forfeit to him or them the sum of one hundred dollars.¹²

What Real Property May Be Mortgaged.

SECTION 88. Any interest in real property

(11) Civil Code, §§2938-2940

(12) Civil Code, §2941

which is capable of being transferred may be mortgaged.¹³

Form of Mortgage of Real Property.

SECTION 89. The code form of mortgage of real property is as follows:

"This mortgage, made the —— day of ——, in the year ——, by A B, of ——, mortgagor; to C D, of ——, mortgagee, witnesseth,—

"That the mortgagor mortgages to the mortgagee (here describe the property), as security for the payment to him of —— dollars, on (or before) the —— day of ——, in the year ——, with interest thereon (or as security for the payment of an obligation, describing it, etc.)

"A B."¹⁴

When Grant of Real Property is Recorded as Mortgage.

SECTION 90. When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee, or his heirs or devisees, or persons having actual notice, unless an instrument of de-

(13) Civil Code, §2947

(14) Civil Code, §2943

feasance, duly executed and acknowledged, shall have been recorded in the office of the county recorder of the county where the property is situated.¹⁵

Record of Mortgages of Real Property.

SECTION 91. Mortgages of real property may be acknowledged or proved, certified, and recorded, in like manner and with like effect as grants thereof.¹⁶

What Personal Property May Be Mortgaged.

SECTION 92. Mortgages may be made upon all growing crops, including grapes and fruit, and upon any and all kinds of personal property, except the following:

1. Personal property not capable of manual delivery;
2. Articles of wearing apparel and personal adornment;
3. The stock in trade of a merchant.¹⁷

Mortgages upon personal property other than that permitted by law to be mortgaged, and mortgages not made in conformity with law, are nevertheless valid between the parties, their

(15) Civil Code, §2950

(16) Civil Code, §2952

(17) Civil Code, §2955

heirs, legatees and personal representatives, and persons who, before parting with value, have actual notice thereof.¹⁸

Form of Personal Property Mortgages.

SECTION 93. The form prescribed by the Code is as follows:

“This mortgage, made the —— day of ——, in the year ——, by A B, of ——, by occupation a ——, mortgagor, to C D, of ——, by occupation a ——, mortgagee, witnesseth,—

“That the mortgagor mortgages to the mortgagee (here describe the property), as security for the payment to him of —— dollars on (or before) the —— day of ——, in the year ——, with interest thereon (or, as security for the payment of a note or obligation, describing it, etc.)

“A B.”¹⁹

Further Requisites of Personal Property Mortgages.

SECTION 94. A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless,—

1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith,

(18) Civil Code, §2973; *Bank of Ukiah v. Gibson*, 109 Cal., 199

(19) Civil Code, §2956

and without any design to hinder, delay, or defraud creditors;

2. It is acknowledged or proved, certified, and recorded, in like manner as grants of real property.²⁰

Record of Personal Property Mortgages.

SECTION 95. *When and where.* A mortgage of personal property must be recorded in the office of the county recorder of the county in which the mortgagor resides, if the mortgagor be a resident of this state, and it shall also be recorded in the county in which the property mortgaged is situated, or to which it may be removed. Except as it is otherwise in this article provided, mortgages of personal property may be acknowledged or proved, certified, and recorded in like manner and with like effect as grants of real property; but they must be recorded in books kept for personal mortgages exclusively.

SECTION 96. *Of ships.* A mortgage of any vessel or part of any vessel under the flag of the United States is void as against any person (other than the mortgagor, his heirs and devisees, and persons having actual notice thereof), unless the mortgage is recorded in the office of the collector of customs where such vessel is registered or enrolled.

(20) Civil Code, §2957

12373

SECTION 97. *Of Property in transit.* For the purposes of this article, property in transit from the possession of the mortgagee to the county of the residence of the mortgagor, or to a location for use, is, during a reasonable time for such transportation, to be taken as situated in the county in which the mortgagor resides, or where it is intended to be used.

SECTION 98. *Of Property of a common carrier.* For a like purpose, personal property used in conducting the business of a common carrier is to be taken as situated in the county in which the principal office or place of business of the carrier is located.

SECTION 99. *Of Property in different places.* A single mortgage of personal property, embracing several things of such character, or so situated that by the provisions of this article separate mortgages upon them would be required to be recorded in different places, is only valid in respect to the things as to which it is duly recorded.

SECTION 100. *Certified copies may be recorded.* A certified copy of a mortgage of personal property once recorded may be recorded in any other county, and when so recorded, the rec-

ord thereof has the same force and effect as though it was of the original mortgage.²¹

Removal of Property Mortgaged.

SECTION 101. *Exempt from mortgage, when.* When personal property mortgaged is thereafter removed from the county in which it is situated, the lien of the mortgage shall not be affected thereby for thirty days after such removal; but, after the expiration of such thirty days, the property mortgaged is exempted from the operation of the mortgage, except as between the parties thereto, until either:

1. The mortgagee causes the mortgage to be recorded in the county to which the property has been removed; or

2. The mortgagee takes possession of the property, as prescribed in the next section.²²

Failure of the mortgagee to record the mortgage in the county to which the property has been removed within thirty days after such removal *ipso facto* exempts the property for all time and wherever afterwards situated from the operation of the mortgage in so far as it concerns creditors of the mortgagor, unless the mortgagee within that time takes possession of the property.²³

(21) Civil Code, §§2958-2964

(22) Civil Code, §2965

(23) Hopper v. Keys, 152 Cal. 488

But one who purchases such mortgaged property in the county to which it is removed within the period of thirty days after the removal, without actual notice of the mortgage, is guilty of conversion, for which conversion the mortgagee acquires a cause of action when it is committed and does not lose by failing subsequently to record the mortgage.²⁴

SECTION 102. *May be taken as a pledge, when.* If the mortgagor voluntarily removes or permits the removal of the mortgaged property from the county in which it was situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due.²⁵

Attachment of Personal Property Mortgaged.

SECTION 103. Personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of the mortgagor, but before the property is so taken the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mort-

(24) *Hammels v. Sentous*, 151 Cal. 520

(25) Civil Code, §2966

gagee. When the property thus taken is sold under process, the officer must apply the proceeds of the sale as follows:

1. To the repayment of the sum paid to the mortgagee, with interest from the date of such payment; and

2. The balance, if any, in like manner as the proceeds of sales under execution are applied in other cases:²⁶

Mortgage on Crops.

SECTION 104. The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of mortgagor.²⁷

(26) Civil Code, §§2968 2970

(27) Civil Code, §2972

CHAPTER VI.

HOMESTEADS.

§105	Meaning of.
106	Head of a family, who is.
107-111	Selection of.
112-114	Declaration of homestead.
115	Exempt from execution.
116	Subject to execution when.
117	How conveyed or encumbered.
118	Abandonment of.
119	Proceedings on execution against homestead
120	Of insane persons.

Meaning of.

SECTION 105. Homestead means "home place." It is something distinct from the legal title, and consists of the dwelling house in which the claimant resides and the land on which the same is situated, set apart as provided by law, for the purpose of providing a home for the family and protecting it against the improvidence or misfortune of the head or other member of the family.¹ The homestead limits and qualifies the right of the owner of the title for the benefit and protection of both spouses while living, and to insure future protection to the survivor. (See, Effect of filing for record, Sec. 114, *post.*)

(1) Civil Code, §1237

Head of a Family, Who Is.

SECTION 106. The phrase "head of a family," as used in the law of homesteads, includes within its meaning,—

1. The husband, when the claimant is a married person;

2. Every person who has residing on the premises, with him or her, and under his or her care and maintenance, either,—1. His or her minor child, or minor grandchild, or the minor child of his or her deceased wife or husband; 2. A minor brother or sister, or the minor child of a deceased brother or sister;

3. A father, mother, grandfather, or grandmother;

4. The father, mother, grandfather, or grandmother of a deceased husband or wife;

5. An unmarried sister, or any other of the relatives mentioned in this section, who have attained the age of majority, and are unable to take care of or support themselves.₂

Selection of.

SECTION 107. *From what it may be selected.* If the claimant be married, the homestead may

(2) Civil Code, §1261

be selected from the community property, or the separate property of the husband, or with the consent of the wife, from her separate property. When the claimant is not married, but is the head of a family, within the meaning of the above section, the homestead may be selected from any of his or her property.³

SECTION 108. *From what it may not be selected.* The homestead cannot be selected from the separate property of the wife without her consent, shown by her making, or joining in making, the declaration of homestead.⁴

SECTION 109. *Limitation as to value.* A homestead may be selected and claimed,—

1. Of not exceeding five thousand dollars in value, by any head of a family;
2. Of not exceeding one thousand dollars in value, by any other person.⁵

SECTION 110. *How made by head of a family.* In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute

(3) Civil Code, §1238

(4) Civil Code, §1239

(5) Civil Code, §1260

and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.⁶ (See Head of a family, who, Sec. 106, *supra*.)

SECTION 111. *How made by other than head of a family.* Any person other than the head of a family, in the selection of a homestead, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead. In case the homestead is selected by any other than the head of a family, the property must not exceed in value the sum of one thousand dollars.⁷ (See Limitation as to value, Sec. 109, *supra*.)

Declaration of Homestead.

SECTION 112. *Contents of.* The declaration of homestead, if made by the head of a family, must contain,—

1. A statement, showing that the person making it is the head of a family, and, if the claimant is married, the name of the spouse; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that

(6) Civil Code, §1262

(7) Civil Code, §1266

she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises, and claims them as a homestead;

3. A description of the premises;

4. An estimate of their actual cash value.,

If made by a person other than the head of a family it must contain everything required by subdivisions second, third and fourth above stated.,

SECTION 113. *Recording of.* The declaration must be recorded in the office of the recorder of the county in which the land is situated.¹⁰

SECTION 114. *Effect of filing for record.* From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, or from the separate property of the spouse making the selection or joining therein, the land so selected on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the law governing homesteads; in other cases, upon

(8) Civil Code, §1263

(9) Civil Code, §1267

(10) Civil Code, §1264

the death of the person whose property was selected as a homestead, it shall go to the heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it or the products, rents, issues or profits thereof, be held liable for the debts of the owner except as provided by law; and should the homestead be sold by the owner, the proceeds arising from such sale to the extent of the value allowed for a homestead exemption as provided in this title shall be exempt to the owner of the homestead for a period of six months next following such sale.¹¹

Whatever be the character of the title or interest in the land held at the time of the filing of the declaration, the claim will attach to such title or interest, and whatever may inure to or grow out of that title will be impressed with the lien, equally with the original title.¹²

Exempt from Execution.

SECTION 115. The homestead is protected against the claims of creditors while it is occupied as a home, and is exempt from execution and forced sale except as set forth in the next section.

(11) Civil Code, §1265

(12) *Alexander v. Jackson*, 92 Cal., 519

Subject to Execution When.

SECTION 116. The homestead is subject to execution or forced sale in satisfaction of judgments obtained,—

1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises;

2. On debts secured by mechanics, contractors, sub-contractors, artisans, architects, builders, laborers of every class, materialmen's or vendors' liens upon the premises;

3. On debts secured by mortgages on the premises, executed and acknowledged by the husband and wife, or by an unmarried claimant;

4. On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record.¹³ (See Proceedings when value of homestead exceeds exemption. Sec. 119, *post*.)

How Conveyed or Encumbered.

SECTION 117. The homestead of a married person cannot be conveyed or encumbered, unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife.¹⁴

(13) Civil Code, §1241

(14) Civil Code, §1242

Abandonment of.

SECTION 118. A homestead can be abandoned only by a declaration of abandonment, or a grant thereof executed and acknowledged,—

1. By the husband and wife, if the claimant is married;
2. By the claimant, if unmarried.

A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded.¹⁵

Proceedings on Execution Against Homestead.

SECTION 119. In all cases in which the homestead is exempt from execution and forced sale (see Exempt from Execution, Sec. 115, and Subject to Execution, Sec. 116, *supra*), if the value of the property exceeds the homestead exemption, then the property is subject to execution for the enforcement of a judgment to the extent of such excess. In such cases, upon proper application by a judgment creditor to the superior court for the appointment of appraisers, the homestead may be appraised, and if the appraised value exceeds the homestead exemption the appraisers must determine whether the property can be divided; if it can be, then the court must direct the appraisers

(15) Civil Code, §§1243, 1244

to set off so much including the residence as will amount in value to the homestead exemption; if it cannot be divided, then the property must be sold, and the proceeds of sale to the amount of the exemption must be paid to the claimant, and the balance applied to the satisfaction of the execution.

The application for appointment of appraisers above referred to may be made by a judgment creditor at any time within sixty days after levy of execution, but if not so made within sixty days the lien of the execution shall cease at the expiration of said period and no execution based upon the same judgment shall thereafter be levied upon the homestead.

Further, within ninety days from the date of filing the petition for such appointment, a copy thereof, with notice of the time and place of hearing must be served upon the claimant or his attorneys at least two days before the hearing, and if such notice shall not be served, the lien of the execution shall cease at the expiration of said period of ninety days, and no execution based upon the same judgment shall thereafter be levied upon the homestead.¹⁶

(16) Civil Code, §§1245-1259

Of Insane Persons.

SECTION 120. In 1905 some new sections were added to the code, providing, that in case either husband or wife is hopelessly insane, the husband or wife not insane may apply to the superior court of the county in which the property is situated for leave to sell or mortgage the homestead to raise money to satisfy a lien thereon, or to provide for the support and care of the sane or insane spouse or their minor children; and after proceedings regularly had, if it appears to the court that such husband or wife is hopelessly insane the court will make an order permitting the sale or encumbrance of such homestead by the husband or wife not insane.¹⁷

(17) Civil Code, §§1269a-1269c

CHAPTER VII.

AFFIDAVITS.

- §121 Nature of.
- 122 Use of.
- 123 Authority to take.
- 124-127 Requisites of.

Nature of.

SECTION 121. An affidavit is an oath reduced to writing, sworn to before some officer authorized to administer oaths. To make an affidavit as to any fact is to declare it under oath in writing. There is, therefore, no such thing as an unwritten affidavit. It is defined by the code to be "a written declaration under oath, made without notice to the adverse party."¹ It differs from a deposition in that the latter is evidence given by a witness under interrogatories, oral or written, upon notice to the adverse party in order that he may be represented, whereas an affidavit is a mere voluntary act and may be *ex parte*. The question whether the personal presence of the affiant before the notary is necessary to the administration of an oath, arose in the case of *Fairbanks, Morse & Co. v. Getchell*, 13 Cal. App. 458, in which case the oath to an affidavit for attachment was administered by communication had between the

(1) Code of Civil Procedure, §2003

notary and the affiant over the telephone. It was contended that the act was void and of no effect for that reason. That question was not decided by our own appellate court for the reason that its decision was not necessary to a determination of that case; but it was remarked that the contention against the validity of such an oath finds direct support in the case of *Sullivan v. First Nat. Bank*, 37 Tex. Civ. App. 228, (83 S. W. 421). In this last case the Texas Appellate court say: "Not only is the personal presence of the affiant required to the end that by appropriate form and ceremony his conscience may be bound, but it is required also to the end that the officer may see and know that the man who signs also swears."

Use of.

SECTION 122. By affidavit, is one of the modes prescribed by law for taking the testimony of witnesses. Another mode is by deposition (see *Depositions*, Secs. 128-146, *post*), and the third mode is by oral examination, by which is meant an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.² The rule is that the best evidence must be produced which the nature of

(2) Code of Civil Procedure, §§2002, 2004, 2005.

the transaction will permit of, and, of course, affidavits are not in the nature of the best evidence by which to prove issuable facts. The testimony of witnesses in open court, where the adverse party may have an opportunity to cross-examine, is the best method. The use of affidavits is generally confined to matters of procedure, matters collateral, ancillary or incidental to an action or proceeding. An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other case expressly permitted by some other provision of the code, such as, to prove the publication of a document or notice required by law to be published in a newspaper.³

Authority to Take.

SECTION 123. An affidavit to be used before any court, judge or officer of this state, may be taken before any officer authorized to administer oaths.⁴ An attorney, if a notary, may administer an oath to and take the affidavit of his client. It has been held that there is nothing in the law

(3) Code of Civil Procedure, §§2009, 2010

(4) Code of Civil Procedure, §2012

to prohibit him from doing so.⁵ It is essential that the oath be taken before an officer having authority to administer it in the particular case, in order to constitute the offense of perjury. However false an oath may be, one cannot be convicted of perjury except the officer who administers the oath have legal authority to administer it.⁶ (See Jurisdiction, Sec. 7, *supra*.)

Requisites of.

SECTION 124. *In general.* The essential requirements, apart from the title, venue and jurat, are: (1) That an oath shall be administered by an officer authorized by law to administer it (see Oaths and affirmations, Secs. 144-146, *post*); (2) that what the affiant states under such oath shall be in writing; and (3) that the written statement so sworn to shall be subscribed by the party making it. It should be free from interlinations and erasures, but if there are any it is well that they be noted by the notary on the margin of the paper to indicate that they were made at the time of swearing and not inserted after.

SECTION 125. *Title.* If the affidavit is to be used in an action or proceeding, it should show the title of court and cause in which it is to be used. It is provided, however, that an affidavit

(5) *Reavis v. Cowell*, 56 Cal., 588

(6) *People v. Cohen*, 118 Cal. 74

without the title of the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.⁶

SECTION 126. *Venue.* The venue in an affidavit, as in a certificate of acknowledgment, is *prima facie* evidence of the place where it is taken, and the place where it is taken, should, of course, be within the territorial jurisdiction of the officer administering the oath, as will appear from his official seal attached to the instrument. Nevertheless it has been held that the omission of the venue is not fatal to an affidavit, where the oath was administered by an officer authorized to administer the same, and the legal presumption that he acted within his jurisdiction is aided by the title of court and cause of the legal proceedings.⁷ (See Venue to certificate of acknowledgment, Sec. 29, *supra*.)

SECTION 127. *Jurat.* This is the certificate of the officer, ordinarily added at the foot of the affidavit, stating that the same was "subscribed and sworn to before" him on a certain day, and followed by his signature and official designation. The signature of the officer should be authenticated by his official seal.

(6) Code of Civil Procedure, §1046

(7) *Reavis v. Cowell*, 56 Cal., 588

CHAPTER VIII.

DEPOSITIONS.

- §128 Definition and nature of.
- 129 When may be taken in this state.
- 130-131 Manner of taking.
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- 144-146 Oaths and affirmations.

Definition and Nature of.

SECTION 128. As defined by the code, a deposition is a written declaration under oath made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.¹ In all cases where a written declaration under oath is used, other than where an affidavit is allowed by law, it must be by deposition.² As said before (Sec. 122, *supra*), the testimony of witnesses given in open court on the trial of an action, where the adverse party may have an opportunity to cross-examine, is the most satisfactory method of proving facts in controversy. There are certain cases, however, when the testimony of witnesses *must* be taken by deposition, if taken

(1) Code of Civil Procedure, §2004

(2) Code of Civil Procedure, §2019

at all, as when they reside without the jurisdiction of the court and cannot be compelled to attend the trial, and also other cases when the deposition is permitted to be taken if desired, all as set forth in the following section.

When May Be Taken in This State.

SECTION 129. The testimony of a witness in this state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases:

1. When the witness is a party to the action or proceeding or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended;

2. When the witness resides out of the county in which his testimony is to be used, or resides in the county but more than fifty miles distant from the place of trial or hearing by the nearest usual traveled route;

3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required;

4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend;

5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required;

6. When the witness is the only one who can establish facts or a fact material to the issue; *provided*, that the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause.³

Manner of Taking.

SECTION 130. *In this state.* Either party to an action may take the deposition of a witness in either of the cases shown in the preceding section, upon giving the notice, accompanied by the affidavit, or taking such other steps as are required by law.⁴ Depositions must be taken in the form of question and answer. The words of the witness must be written down, in the presence of the witness, by the officer taking the deposition, or by some disinterested person appointed by him. It may be taken down in shorthand, in which case it must be transcribed into long-hand by the person who took it down. When completed, it must be carefully read to or by the witness and corrected by him in any par-

(3) Code of Civil Procedure, §2021

(4) Code of Civil Procedure, §2031

ticular, if desired, by writing or causing his corrections to be written in the body or margin of or at the bottom of the deposition, and must then be subscribed by the witness. The officer before whom the deposition is taken must write his initials near said corrections. If the parties agree in writing to any other mode, the mode so agreed upon must be followed.⁵

Either party to the action may attend the examination, and put such questions, direct and cross, as may be proper. The deposition, when completed, must be carefully read to the witness and corrected by him in any particular, if desired, and must then be subscribed by him.⁶ This makes the reading, correcting and signing the necessary and material things to be done. The object of requiring the witness to sign the deposition is to make him responsible for its phraseology, for by signing he adopts the language as his own.⁷ The deposition must then be certified by the officer taking it, enclosed in an envelope or wrapper, sealed and directed to the clerk of the court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the officer to

(5) Code of Civil Procedure, §2006

(6) Code of Civil Procedure, §2032

(7) *Kyle v. Craig*, 125 Cal., 115, 116

the clerk or such person, or transmitted through the mail, or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice.

SECTION 131. *To be used out of the state.* The deposition of a witness taken in this state to be used in a matter or proceeding pending in the court of another state, must be taken in accordance with the law of the state governing the matter or proceeding in which the same is to be used, and instructions should accompany the commission.

Certificate to.

SECTION 132. The notary must attach his certificate to the deposition, which certificate must be in proper form and show all the acts done by him in relation to the taking of the deposition.

[Appendix Form No. 12.]

Subpoena.

SECTION 133. *Subpoena defined.* The process by which the attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a wit-

ness. It may also require him to bring with him any books, documents, or other things under his control, which he is bound by law to produce in evidence.

SECTION 134. *How issued.* A subpoena is issued as follows:

1. To require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein, it is issued by the clerk of the court in which the action or proceeding is pending, under the seal of the court, or if there is no clerk or seal then by a judge or justice of such court;

2. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by the clerk of the superior court of the county in which the witness is to be examined, under the seal of such court;

3. To require attendance out of court, in cases not provided for in subdivision one, before a judge, justice or other officer authorized to administer oaths, or take testimony in any mat-

ter under the laws of this state, it is issued by the judge, justice or other officer before whom the attendance is required.

If the subpœna is issued to require attendance before a court, or at the trial of an issue therein, it is issued by the clerk, as of course, upon the application of the party desiring it. If it is issued to require attendance before a commissioner or other officer upon the taking of a deposition, it must be issued by the clerk of the superior court of the county wherein the attendance is required upon the order of such court or of a judge thereof, which order may be made *ex parte*.¹⁰

From the case of *Scott v. Shields*, 8 Cal. App. 12, it appears that there is some conflict in the foregoing provisions relating to the issuance of a subpœna. That was a case pending in Placer County in which it was sought to take the deposition of a witness residing in Sacramento County, and under the authority of the last paragraph the superior court of Sacramento County made an order directing the clerk of his court to issue the subpœna. It was contended that the subpœna requiring the attendance of the witness, under such circumstances, should have been issued by the notary before whom the witness was to appear

(10) Code of Civil Procedure, §1986

under subdivision 3 of this section. The appellate court upheld the issuance of the subpoena by the clerk of the superior court of Sacramento County, saying that if the provisions conflict, the latter provision of this section would prevail over the former under the well-settled rule of construction.

Prior to 1907 a notary public had power to issue a subpoena requiring attendance before him upon the taking of a deposition in an action or proceeding pending in court. But while a notary had power to issue such a subpoena that procedure was for a long time ineffectual to bring a witness before the notary for the reason that the supreme court decided in the case of *Lezinsky v. Superior Court*, 72 Cal. 510, that in case the witness refused to obey the subpoena of the notary public before whom his deposition was to have been taken, the court in which the action was pending had no power to punish him for contempt—such refusal being contempt of the officer issuing the subpoena and not contempt of court. It therefore became customary to have subpoenas requiring the attendance of witnesses before notaries issued by the clerk of the court in which the action was pending, under the seal of the court, in order that disobedience of the subpoena might be reported back to the court and punished as contempt by the court. Later, the decision

in the case of *Lezinsky v. Superior Court* was overruled by the case of *Burns v. Superior Court*, 140 Cal. 1, on the ground that the conduct of the witness in refusing to attend at the time and place fixed for the taking of the deposition was an interference with the proceedings of the court, and could therefore be punished as contempt of court. However, by the act of the legislature of 1907 amending section 1986 of the Code of Civil Procedure, the procedure is now settled, and a subpœna requiring attendance before a notary public upon the taking of a deposition must be issued by the clerk of the superior court of the county wherein the attendance is required, upon the order of such court or of a judge thereof. Under subdivision 3 of that section (see subdivision 3 of this section) a notary may still issue a subpœna in certain cases. Punishment for disobedience to such a subpœna is also provided for. (See Disobedience to subpœna, how punished, Sec. 137, *post.*)

SECTION 135. *How served.* The service of a subpœna is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attend-

ance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person. If a witness is concealed in a building or vessel, so as to prevent the service of a subpoena upon him, any court or judge, or any officer issuing a subpoena, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpoena; and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.¹¹

SECTION 136. *When witness not compelled to obey.* A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than fifty miles from his place of residence to the place of trial.¹²

SECTION 137. *Disobedience to subpoena, how punished.* Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court issuing the subpoena. When the subpoena, in

(11) Code of Civil Procedure, §§1987, 1988

(12) Code of Civil Procedure, §1989

any such case, requires the attendance of the witness before an officer or commissioner out of court, it is the duty of such officer or commissioner to report any such disobedience or refusal to the court issuing the subpoena; and the witness must not be punished for any refusal to answer a question or to subscribe an affidavit or deposition, unless, after a hearing upon notice, the court orders him to so answer or subscribe, and then only for disobedience to such order. Any judge, justice, or other officer mentioned in subdivision three of section 1986 (see subdivision 3 of section 134, *supra*), may report any such disobedience or refusal to the superior court of the county in which such attendance was required, and such court thereupon has power, upon notice, to order the witness to perform the omitted act, and any refusal or neglect to comply with such order may be punished as a contempt of such court.¹³

SECTION 138. *Punishment in case of disobedience.* In addition to punishment for contempt, a witness disobeying a subpoena forfeits to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.¹⁴

(13) Code of Civil Procedure, §1991

(14) Code of Civil Procedure, §1992

SECTION 139. *Attendance, how enforced.* In case of failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required. Every such warrant of commitment, issued by a court or officer, must specify therein, particularly, the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness, pursuant hereto, must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process issued by the superior court.¹⁵

SECTION 140. *If witness is a prisoner, how may be brought.* If the witness be a prisoner, confined in a jail or prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be made as follows:

1. By the court itself in which the action or

(15) Code of Civil Procedure, §§1993, 1994

special proceeding is pending, unless it be a justice's court.

2. By a justice of the supreme court, or a judge of the superior court of the county where the action or proceeding is pending, if pending before a justice's court, or before a judge or other person out of court.

Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed, must be taken upon deposition.¹⁶

Witnesses.

SECTION 141. *Duty to attend, and answer questions.* A witness served with a subpoena must attend at the time appointed, with any papers under his control lawfully required by the subpoena, and answer all pertinent and legal questions; and, unless sooner discharged, must remain until the testimony is closed.

He must answer questions legal and pertinent

(16) Code of Civil Procedure, §§1995-1997

to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue; or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony.¹⁷

SECTION 142. *Right of, to protection from insult.* It is the right of a witness to be protected from irrelevant, improper, or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.¹⁸

SECTION 143. *Right of, to protection from arrest.* Every person who has been, in good faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom.

(17) Code of Civil Procedure, §§2064, 2065

(18) Code of Civil Procedure, §2066

The arrest of a witness, contrary to the foregoing, is void, and when willfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action, at the suit of the party serving the witness with a subpœna, for the damages sustained by him in consequence of the arrest. The court or officer before whom the attendance is required, may discharge the witness from such an arrest, and if the court has adjourned before the arrest, or before application for the discharge, a judge of the court may grant the discharge.

It is also provided that an officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit stating, (1) that he has been served with a subpœna to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpœna was issued; and (2) that he has not thus been served by his own procurement, with the intention of avoiding an arrest; (3) that he is at the time going to the place of attendance, or returning therefrom, or remain-

ing there in obedience to the subpoena. The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested.¹⁹

Oaths and Affirmations.

SECTION 144. *Nature of an oath.* An oath has been defined to be the act of "calling on God to witness that what is said by the person swearing is true, and invoking the divine vengeance on his head if what he says is false."²⁰

SECTION 145. *Authority of notary to administer.* Every court, every judge or clerk of any court, every justice and every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations.²¹

SECTION 146. *Form of.* An oath, or affirmation, in an action or proceeding, may be administered as follows, the person who swears, or affirms, expressing his assent when addressed in the following form: "You do solemnly swear (or affirm, as the case may be) that the evidence you shall give in this issue (or matter) pending between — and —, shall be the truth, the

(19) Code of Civil Procedure, §§2067-2070

(20) 10 Ohio, 121

(21) Code of Civil Procedure, §2093

whole truth, and nothing but the truth, so help you God.”²² In *People v. Collins*, 6 Cal. App. 492, the form of the oath set forth in the indictment was not precisely the same as that given in the statute, and this was criticised by the appellant. The court said: “But the oath set forth is in substance the same as that specified in the statute, and besides ‘It is no defense to a prosecution for perjury that an oath was administered or taken in an irregular manner’.”

Any person who desires it, may at his option, instead of taking an oath, make his solemn affirmation or declaration. This is done by using the word “affirm” or “declare” instead of “swear” in the oath. The form of oath may be varied to suit the belief of the witness, and whenever the court before which a person is offered as a witness is satisfied that the witness has a peculiar mode of swearing connected with or in addition to the usual form of administration, which, in his opinion, is more solemn or obligatory, the court may, in its discretion, adopt that mode. Therefore, when a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.²³

(22) Code of Civil Procedure, §2094

(23) Code of Civil Procedure, §§2095-2097

CHAPTER IX.

BILLS AND NOTES.

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Duty of Notary in Respect to.

SECTION 147. Another of the duties of notaries public is, "When requested, to demand acceptance and payment of foreign, domestic and inland bills or promissory notes, and protest the same for non-acceptance and non-payment. * * "

(See Duties, Sec. 5, sub. 1, *supra*.) Protest must be made by a notary public if one can be obtained. But before passing to the subject of protest in particular, the rules of law governing negotiable instruments in general should be carefully considered in order that the nature of the contract between the parties to these instruments, their respective rights and obligations, and all measures necessary to protect those rights and enforce such obligations in case of dishonor, may be fully understood.

Bills of Exchange.

SECTION 148. *Definition and nature of.* A bill of exchange is an instrument, negotiable in form, by which one, who is called the drawer, requests another, called the drawee, to pay a specified sum of money. A bill of exchange may be drawn in any number of parts, each part stating the existence of the others, and all forming one set. An agreement to draw a bill of exchange binds the drawer to execute it in three parts, if the other party to the agreement desires it. Presentment, acceptance, or payment of a single part in a set of a bill of exchange is sufficient for the whole.¹

(1) Civil Code, §§3171-3175

SECTION 149. *Where payable.* A bill of exchange is payable:

1. At the place where, by its terms, it is made payable.

2. If it specifies no place of payment, then at the place to which it is addressed.

3. If it is not addressed to any place, then at the place of residence or business of the drawee, or wherever he may be found. If the drawee has no place of business, or if his place of business or residence cannot, with reasonable diligence, be ascertained, presentment for payment is excused, and the bill may be protested for non-payment.²

SECTION 150. *Parties to.* The parties to a bill of exchange are: (1) The drawer; (2) the drawee, and (3) the payee. If the drawee is willing to pay the bill at maturity and "accepts" the same upon presentation to him for that purpose, he then becomes the acceptor. If the payee transfers the bill and all his rights under it by writing his name across the back and delivering it to another, he becomes an endorser, and the person to whom it is transferred becomes the payee. Such payee may again transfer the instrument by endorsement, and so on, again and again. A

(2) Civil Code, §3176

bill of exchange may give the name of any person, in addition to the drawee to be resorted to in case of need, and in that case the bill of exchange must be presented to such drawee in case of need for acceptance or payment, as the case may be, before it can be treated as dishonored.³

SECTION 151. *Foreign and inland bills.* An inland bill is one drawn and payable in this state. All others are foreign.⁴ The states of the Union are considered foreign to each other for the purposes of negotiable paper. The law does not require protest in case of the dishonor of an inland bill or promissory note, but foreign bills *must* be protested.⁵ (See Protest, when necessary, Sec. 224, *post.*) Inland bills, and promissory notes are not required to be protested, but *may* be under the law, and this precaution is usually taken for the purposes of evidence.

Promissory Notes.

SECTION 152. *Definition and nature of.* A promissory note is an instrument negotiable in form, whereby the signer promises to pay a specified sum of money.⁶

(3) Civil Code, §§3172, 3188

(4) Civil Code, §3224

(5) Civil Code, §3225

(6) Civil Code, §3244

SECTION 153. *When bill of exchange is deemed a promissory note.* An instrument in the form of a bill of exchange, but drawn upon and accepted by the drawer himself, is to be deemed a promissory note. A bill of exchange, if accepted, with the consent of the owner, by a person other than the drawee, or an acceptor for honor, becomes in effect the promissory note of such person, and all prior parties thereto are exonerated.⁷

SECTION 154. *Parties to.* The parties to a promissory note are: (1) the maker, and (2) the payee. The payee of a promissory note may transfer the same by endorsement and delivery to a third person, and thus become an endorser the same as the payee of a bill of exchange.

SECTION 155. *Joint or joint and several.* If the note is signed by more than one person, the makers may be jointly or jointly and severally liable, depending upon the form of the note. A note reading "We promise to pay" would be presumed to be joint; one reading "We, jointly and severally, promise to pay" is, of course, joint and several; and a promise made in the first person singular number would be presumed to be joint and several, as each signer promises to be responsible for the full amount.⁸ All the makers

(7) Civil Code, §§3245, 3246

(8) Civil Code, §§1659, 1660

must be joined as defendants in an action on a joint promissory note, whereas a joint and several obligation may be sued on as if made by any one of the signers alone.

Checks.

SECTION 156. *Defined.* A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand, without interest.⁹

SECTION 157. *Subject to what rules.* A check is subject to all the rules of law hereinafter set forth concerning bills of exchange, with the following exceptions:

1. The drawer and endorsers are exonerated by delay in presentment, only to the extent of the injury which they suffer thereby.

2. An endorsee, after its apparent maturity, but without actual notice of its dishonor, acquires a title equal to that of an endorsee before such period.¹⁰

Bank-Notes.

SECTION 158. Bank notes are in the nature of promissory notes issued by a bank, payable to bearer. A bank note remains negotiable, even after it has been paid by the maker.¹¹

(9) Civil Code, §3254

(10) Civil Code, §3255

(11) Civil Code, §3261

Certificates of deposit.

SECTION 159. Certificates of deposit are negotiable instruments belonging to a class of their own, and in the business world, as well as in legislation and the decisions of the courts, certificates of deposit are understood to represent money left with a bank or banker and which is to be retained until the depositor demands it, the certificate being in the nature of a receipt executed by the bank therefor. No time of payment being specified, it is payable immediately.¹²

Relation of the Parties to Bills and Notes.

SECTION 160. The rights and obligations of the drawer of a bill of exchange are the same as those of the first endorser of any other negotiable instrument.¹³ It is also true that the maker of a note is in the same position as the acceptor of a bill. In the case of a promissory note there is a promise by one person to pay to another, or order, a specified sum of money. As said before, this instrument may be transferred by endorsement, and the endorsee or holder of the note, upon seeking to collect it, looks first to the maker of the note, and then to the endorser. In the case of a bill of exchange, there is no promise. One person

(12) *Murphy v. Pacific Bank*, 130 Cal., 548

(13) Civil Code, §3177

requests another to pay to a third person a specified sum of money. Such an instrument must be presented for acceptance, and if the drawee is willing to do as directed and accepts the bill, he then promises to pay in the same manner as the maker of a note. But if he refuses to accept, or, if he accepts and on presentation for payment, refuses to pay, the holder has a right to look to the drawer for payment. The holder then, of a bill of exchange, looks first to the drawee or acceptor, and then to the drawer and endorsers, in their order, if there are endorsers. The nature of the contract between the endorser and endorsee of a promissory note is, that the former will pay the note if the maker does not, and the nature of the contract between the drawer and payee of a bill is, that the former is responsible for the bill in case the drawee refuses to accept or pay the same. (See Negotiability, effect of, Sec. 161, *post.*)

Negotiability.

SECTION 161. *Effect of.* In *Shakespear v. Smith*, 77 Cal., 642, the term "negotiable instruments" is defined to mean "such instruments as carry with them the legal title by endorsement and delivery, as well as when transferred before maturity the right to recover their full face value

without reference to defenses affecting their validity." And the following explanation of negotiable instruments is made in *Adams v. Seaman*, 82 Cal., 636: "When one man promises to pay money to another in the future, if he puts that promise in the form of a negotiable paper, he gives to the promise characteristics which do not belong at all to ordinary indebtedness. If A merely promises—either orally or by common writing—to pay B one thousand dollars at the expiration of ten months (which would be a non-negotiable instrument), and during that time B becomes indebted to A on other transactions in the sum of five hundred dollars, the latter sum can be set off against the former; and it can be so set off against an assignee of B if it accrued before notice of assignment. But if the promise be made in the shape of a negotiable promissory note, then, if B endorse the note before the expiration of the ten months to a third party, the latter can compel A to pay him the whole amount of the note, no matter how many set-offs he may have against B. In order, however, for this to be so, the note must clearly comply with the requisites of negotiable paper, and one of the main requisites—in addition to negotiable words, such as payable to 'order' or 'bearer'—is absolute certainty as to the amount

of money to be paid, a certainty which must appear upon the face of the instrument." It is to be noticed that this peculiar characteristic of negotiable paper does not attach to the instrument until it has passed into the hands of a third party. As between the immediate parties to a note—the maker and the payee—the maker may present any defenses he may have. But when the paper is transferred by endorsement to a third party, it passes free from any equities between the original parties to the instrument unless the time and manner of transfer lays the instrument open to them, as stated in the next section.

SECTION 162. *Transfer after maturity.* The purchaser of a note after maturity is not an "endorsee in due course" and does not acquire a title free from defects in the title of the person from whom he acquired it. (See Endorsee in due course defined, Sec. 176, *post.*) If a negotiable instrument is transferred after it is overdue, the transferee takes it subject to any equities or defenses existing between the original parties to it.¹⁴ The endorser of an overdue negotiable note has as much right to demand and notice as the endorser of a note before maturity, the only difference being as to the time when the demand

(14) *Chase v. Whitmore*, 68 Cal., 545

and notice must be given. Held in *Beer v. Clifton*, 98 Cal., 326, that in such case demand and notice must be within a reasonable time, at least within the time specified for demand and notice in case of a note payable on demand.

A non-negotiable written contract for the payment of money or personal property may be transferred by endorsement in like manner with negotiable instruments. Such endorsement shall transfer all the rights of the assignor under the instrument to the assignee subject to all equities and defenses existing in favor of the maker at the time of the endorsement.

All the provisions of our statutes, hereinafter set forth, in regard to presentment, notice and protest, have no application to the case of a non-negotiable instrument; they apply only to negotiable instruments.

Instrument, When Negotiable.

SECTION 163. *Must be payable to order or bearer.* The words "or order" or "to bearer," whether in a promissory note or bill of exchange, are words of negotiability. A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer, and an instrument, otherwise negotiable

in form, payable to a person named, "or to his order," or "to bearer," is in the former case payable to the written order of such person, and in the latter case payable to the bearer.¹⁵ But these words, while necessary to a negotiable instrument, do not of themselves make an instrument negotiable unless certain other provisions of the law hereinafter set forth are also complied with.

SECTION 164. *Must be unconditional except that it may provide for attorney's fees.* A negotiable instrument must be made payable in money only and without any condition not certain of fulfillment, except that it may provide for the payment of attorney's fees and costs of suit, in case suit be brought thereon to compel the payment thereof.¹⁶ The exception in favor of a stipulation for attorney's fees, to the rule above stated that a negotiable instrument must be absolutely unconditional, was added to this section of the Civil Code by the legislature of 1905. There are many cases reported in which our supreme court has held that an instrument otherwise negotiable in form, and which in the hands of an endorsee before maturity would not have been subject to any of the equities of the maker against the original payee if it did not contain the clause

(15) Civil Code, §§3087, 3101

(16) Civil Code, §3088

providing for attorney's fees in case of suit, has been rendered non-negotiable by such a stipulation. But the action of the legislature in amending the section above referred to has changed the rule, and a negotiable instrument may contain the clause providing for the payment of attorney's fees and costs in case of suit. (See, What negotiable instruments may contain, Sec. 167, *post.*)

SECTION 165. *Payee must be designated.* It is also essential that the person to whose order a negotiable instrument is made payable must be ascertainable at the time the instrument is made.¹⁷ The payee, therefore, should be distinctly named, unless it is payable to bearer. We have another section which reads: "A negotiable instrument, made payable to the order of a person obviously fictitious, is payable to the bearer."¹⁸ And under section 3102 of the Civil Code a negotiable instrument, made payable to the order of the maker, or of a fictitious person, if issued by the maker for a valid consideration, without endorsement, has the same effect against him and all other persons having notice of the facts as if payable to the bearer. The purpose of this last provision

(17) Civil Code, §3089

(18) Civil Code, §3103

is "that the party who makes an instrument, negotiable in form, payable to his own order, if he receives a valid consideration therefor, shall be estopped from asserting, as against one who brings an action upon the instrument, that he has not endorsed it"; and the rule applies as well where the instrument is payable to the maker and a third person (in case it has been endorsed by such third person), as where it is made payable to the maker alone.¹⁹

SECTION 166. *Date, time and place of payment.* A negotiable instrument may be with or without date, and with or without designation of the time or place of payment.²⁰ Any date may be inserted by the maker of a negotiable instrument, whether past, present, or future, and the instrument is not invalidated by his death or incapacity at the time of the nominal date.²¹ A negotiable instrument which does not specify the time of payment is payable immediately. A negotiable instrument which does not specify a place of payment is payable at the residence or place of business of the maker, or wherever he may be found.²²

(19) *Main v. Hilton*, 54 Cal., 110

(20) Civil Code, §3091

(21) Civil Code, §3094

(22) Civil Code, §§3099, 3100

SECTION 167. *What negotiable instruments may contain.* A negotiable instrument may give to the payee an option between the payment of the sum specified therein and the performance of another act. It may contain a pledge of collateral security, with authority to dispose thereof. It must not contain any other contract than such as is expressly permitted by law.²³

It appears to be settled by the decisions of our Supreme Court that where a note is secured by a mortgage on land, both being executed at the same time, the note, though negotiable in form, is not negotiable in law, where the purchaser takes it with knowledge of the mortgage; at any rate the clause generally inserted in a note secured by mortgage, viz.: "should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder," whether inserted in the note itself or in the mortgage securing it, renders the note non-negotiable.²⁴

SECTION 168. *Classes of negotiable instruments.* There are six classes of negotiable instruments, namely:

(23) Civil Code, §§3090, 3092-3

(24) National Hardware Co. v. Sherwood, 165 Cal., 1; Smiley v. Watson, 23 Cal. App. 409

1. Bills of exchange.
2. Promissory notes.
3. Bank notes.
4. Checks.
5. Bonds.
6. Certificates of deposit.²⁵

SECTION 169. *Presumption as to consideration.* The signature of every drawer, acceptor, and endorser of a negotiable instrument is presumed to have been made for a valuable consideration, before the maturity of the instrument, and in the ordinary course of business, and want of consideration would not exonerate him from liability to an endorsee in good faith.²⁶

Endorsement.

SECTION 170. *Definitions.* One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it with his name thereon, to another person, is called an endorser, and his act is called endorsement.²⁷

(25) Civil Code, §3095

(26) Civil Code, §§3104, 3122

(27) Civil Code, §3108

SECTION 171. *How made.* The ordinary mode of endorsing a note is by the endorser writing his name upon the back thereof, but it is provided that when there is not room for a signature upon the back of a negotiable instrument, a signature equivalent to an endorsement thereof may be made upon a paper annexed thereto. It has been held also that an endorsement may be made upon the face of a note with the same effect as if made on the back. One who agrees to endorse a negotiable instrument is bound to write his signature upon the back of the instrument, if there is sufficient space thereon for that purpose.²⁸

SECTION 172. *Kinds of.* An endorsement may be general or special. A general endorsement is one by which no endorsee is named. A special endorsement specifies the endorsee. A negotiable instrument bearing a general endorsement cannot be afterwards specially endorsed; but any lawful holder may turn a general endorsement into a special one, by writing above it a direction for payment to a particular person. A special endorsement may, by express words for that purpose, but not otherwise, be so made as to render the instrument non-negotiable.²⁹

(28) Civil Code, §§3109, 3110

(29) Civil Code, §§3111, 3115

SECTION 173. *Warranty of endorser.* Every endorser of a negotiable instrument, unless his endorsement is qualified, warrants to every subsequent holder thereof, who is not liable thereon to him:

1. That it is in all respects what it purports to be.

2. That he has a good title to it.

3. That the signatures of all prior parties are binding upon them.

4. That if the instrument is dishonored, the endorser will, upon notice thereof duly given to him, or without notice where it is excused by law, pay the same with interest, unless exonerated by law because of delay in presentment for either acceptance or payment.³⁰ (See Rights of endorsee in due course, Sec. 177, *post*; Rights of endorser, Sec. 178, *post*.)

SECTION 174. *Before delivery to payee.* One who endorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon, as an endorser. Such a party to a note, who endorses it in blank before delivery to the payee, for the purpose of giving it credit, is an endorser, and has all the rights of an endorser.³¹

(30) Civil Code, §3116

(31) Civil Code, §3117; *Fessenden v. Summers*, 62 Cal., 484

A surety, who is an apparent maker, is not an endorser but a guarantor, and a guarantor is liable to the guarantee immediately upon default of the principal without demand or notice. A guaranty is a promise to answer for the debt of another person. A person might be an endorser under this section, and also a guarantor on the same instrument.³²

SECTION 175. *Without recourse.* An endorser may qualify his endorsement with the words, "without recourse," or equivalent words; and upon such endorsement, he is responsible only to the same extent as in the case of a transfer without endorsement. Except as otherwise stated in this paragraph, an endorsement without recourse has the same effect as any other endorsement.³³

SECTION 176. *Endorsee in due course defined.* An endorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly endorsed to him, or endorsed generally, or payable to the bearer.³⁴

(32) *Chafin v. Rich*, 77 Cal., 476; *Southern Cal. Bank v. Wyatt*, 87 Cal., 616; *Loustalot v. Calkins*, 120 Cal., 688

(33) Civil Code, §§3118, 3119

(34) Civil Code, §3128

SECTION 177. *Rights of endorsee in due course.*

An endorsee of a negotiable instrument, in due course, acquires an absolute title thereto, so that it is valid in his hands, notwithstanding any provision of law making it generally void or voidable, and notwithstanding any defect in the title of the person from whom he acquired it.³⁵ He has the same rights against every prior party thereto that he would have had if the contract had been made directly between them in the first instance. The want of consideration for the undertaking of a maker, acceptor, or endorser of a negotiable instrument does not exonerate him from liability thereon to an endorsee in good faith for a consideration.³⁶ (See Presumption as to consideration, Sec. 169, *supra*.)

SECTION 178. *Rights of endorser.* The endorser of a note cannot be held liable unless the holder has used due diligence to collect of the maker of the note (or in case there is more than one endorser, of the maker and the previous endorsers of the note), and this diligence consists of presentment at the proper time and place, and in case of refusal, notice at the time and in the manner required by law. The demand and no-

(35) Civil Code, §3124

(36) Civil Code, §§3120, 3122

tice are conditions precedent which must be performed before the endorser can be held liable. He is only liable in case of dishonor at maturity by the maker. By his contract he does not undertake absolutely to pay the amount of money named. His promise is conditional, and the conditions are as clearly a part of the instrument as if written over his signature. He promises to pay provided the holder, at the maturity of the instrument presents it to the maker for payment and payment is refused, and he is immediately notified of the fact that it is thus dishonored. (See Warranty of endorser, Sec. 173, *supra*.) He has contracted to know and has a right to know that the paper has been presented to the party primarily liable for payment, and been refused, and a right to demand that the information shall be so definitely given as to enable him to fix the liability (Notice of dishonor, Secs. 212-222, *post*), and upon taking up the note, to coerce payment from those back of him, which can only be done when he is advised that the demand was made at a time when the maker was bound to pay and when a failure to do so would dishonor the paper. The endorser is entitled to this notice because his contract provides for it, and it is material to his interests. If the instrument is a bill

of exchange the drawer is in the same position as is the first endorser of a note (see Relation of the parties to bills and notes, Sec. 160, *supra*), and is liable only when due diligence has been used to collect of the acceptor, and proper steps have been taken to charge him. If there are three endorsers on the bill, the last one only promises to pay if the acceptor, the drawer and the two previous endorsers do not. Endorsers guarantee the payment to all subsequent endorsees, and are liable in the order in which their endorsements were made.

SECTION 179. *When instrument is left blank.* One who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank, for the purpose of filling afterward, is liable upon the instrument to an endorsee thereof in due course, in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form.³⁷

Presentment for Acceptance.

SECTION 180. The sections following relating to presentment for acceptance (Secs. 181-184), acceptance (Secs. 185-191), acceptance or pay-

(37) Civil Code, §3125

ment for honor (Secs. 192-196), and presentment of bills of exchange for payment (Secs. 204-208), apply only to bills of exchange.

SECTION 181. *When presentment for acceptance may be made.* At any time before a bill of exchange is payable the holder may present it to the drawee for acceptance, and if acceptance is refused, the bill is dishonored.³⁸ A prudent holder will present it without delay.

SECTION 182. *When must be made.* When a bill of exchange is payable at a specified time after sight, the drawer and endorsers are exonerated if it is not presented for acceptance within ten days after the time which would suffice, with ordinary diligence, to forward it for acceptance, unless presentment is excused.³⁹

SECTION 183. *How must be made.* Presentment for acceptance must be made in the following manner, as nearly as by reasonable diligence it is practicable:

1. The bill must be presented by the holder or his agent.
2. It must be presented on a business day, and within reasonable hours.

(38) Civil Code, §3185

(39) Civil Code, §3189

3. It must be presented to the drawee, or if he be absent from his place of residence or business, to some person having charge thereof, or employed therein; and

4. The drawee, on such presentment, may postpone his acceptance or refusal until the next day. If the drawee have no place of business, or if his place of business or residence cannot with reasonable diligence be ascertained, presentment for acceptance is excused, and the bill may be protested for non-acceptance.

Presentment for acceptance to one of several joint drawees, and refusal by him, dispenses with presentment to the others.

A bill of exchange which specifies a drawee in case of need must be presented to him for acceptance or payment, as the case may be, before it can be treated as dishonored.⁴⁰

SECTION 184. *When excused.* As said in the foregoing section (sub. 4), if the drawee have no place of business, or if his place of business or residence cannot with due diligence be ascertained, presentment for acceptance is excused. It is further provided that presentment of a bill of exchange for acceptance is also excused if the

(40) Civil Code, §§3186-3188

drawee has not capacity to accept it. And also, that delay in the presentment of a bill of exchange for acceptance is excused, when caused by circumstances over which the holder has no control. Presentment of a bill of exchange for acceptance and notice of its dishonor, are excused as to the drawer, if he forbids the drawee to accept the bill, or if, at the time of drawing, he had no reason to believe that the drawee would pay the same.⁴¹

Acceptance.

SECTION 185. *How made generally.* An acceptance of a bill must be made in writing, by the drawee, or by an acceptor for honor, and may be made by the acceptor writing his name across the face of the bill, with or without other words. The holder of a bill of exchange, if entitled to an acceptance thereof, may treat the bill as dishonored if the drawee refuses to write across its face an unqualified acceptance.⁴²

SECTION 186. *What holder may treat as sufficient.* The holder of a bill of exchange may, without prejudice to his rights against prior parties, receive and treat as a sufficient acceptance—

(41) Civil Code, §§3218-3220

(42) Civil Code, §§3193, 3194

1. An acceptance written upon any part of the bill, or upon a separate paper.

2. An acceptance qualified so far only as to make the bill payable at a particular place within the city or town in which, if the acceptance was unqualified, it would be payable; or

3. A refusal by the drawee to return the bill to the holder after presentment, in which case the bill is payable immediately, without regard to its terms.⁴³

SECTION 187. *By separate instrument.* The acceptance of a bill of exchange, by a separate instrument, binds the acceptor to one who, upon the faith thereof, has the bill for value or other good consideration. ⁴⁴

SECTION 188. *Promise to accept when sufficient.* An unconditional promise, in writing, to accept a bill of exchange is a sufficient acceptance thereof, in favor of every person who upon the faith thereof has taken the bill for value.⁴⁵

SECTION 189. *Cancellation of.* The acceptor of a bill of exchange may cancel his acceptance at any time before delivering the bill to the holder, and before the holder has, with the consent of the

(43) Civil Code, §3195

(44) Civil Code, §3196

(45) Civil Code, §3197

acceptor, transferred his title to another person who has given value for it upon the faith of such acceptance.⁴⁶

SECTION 190. *What is admitted by acceptance.* The acceptance of a bill of exchange admits the signature of a drawer, but does not admit the signature of any endorser to be genuine.⁴⁷

Non-Acceptance.

SECTION 191. Should the drawee refuse to accept the bill on presentment for acceptance, it should be protested for non-acceptance, and notice of protest given to the drawer and endorsers in order to charge them. In the case of a foreign bill this is a necessary step and must be taken promptly upon refusal. (See Protest, Secs. 223-235, *post.*)

A bill of exchange, payable at a certain time after sight, which is not accepted within ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance, is presumed to have been dishonored.⁴⁸

(46) Civil Code, §3198

(47) Civil Code, §3199

(48) Civil Code, §3133

Acceptance or Payment for Honor.

SECTION 192. *When may be made.* On the dishonor of a bill of exchange by the drawee, and, in case of a foreign bill, after it has been duly protested, it may be accepted or paid by any person, for the honor of any party thereto.⁴⁹

SECTION 193. *Holder not required to allow acceptance for honor.* The holder of a bill of exchange is not bound to allow it to be accepted for honor, but is bound to accept payment for honor.⁵⁰

SECTION 194. *Acceptance for honor, how made.* An acceptor or payor for honor must write a memorandum upon the bill, stating therein for whose honor he accepts or pays, and must give notice to such parties, with reasonable diligence, of the fact of such acceptance or payment. Having done so, he is entitled to reimbursement from such parties, and from all parties prior to them.⁵¹

SECTION 195. *Acceptor for honor must be treated as endorser.* A bill of exchange which has been accepted for honor must be presented at

(49) Civil Code, §3203

(50) Civil Code, §3204

(51) Civil Code, §3205

its maturity to the drawee for payment, and notice of its dishonor by him must be given to the acceptor for honor, in like manner as to an endorser, after which the acceptor for honor must pay the bill.⁵²

SECTION 196. *Notice of dishonor not excused by acceptance for honor.* The acceptance of a bill of exchange for honor does not excuse the holder from giving notice of its dishonor by the drawee.⁵³

Presentment for Payment of Negotiable Instruments in General.

SECTION 197. *Demand not necessary to charge principal debtor.* It is not necessary to make a demand of payment upon the principal debtor in a negotiable instrument (that is, the maker of a note, or the acceptor of a bill) in order to charge him; but if the instrument is by its terms payable at a specified place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part.⁵⁴ The holder of negotiable paper may hold it as long as he pleases and

(52) Civil Code, §3206

(53) Civil Code, §3207

(54) Civil Code, §3130

not lose his claim against the maker of a note or the acceptor of a bill, provided he does not allow it to be barred by the statute of limitations, which runs against it four years from the date of its maturity; but demand must be made upon the maker or acceptor upon the very day on which the note or bill falls due in order to charge the endorsers or drawer. (See Presentment, how, when and where made, Sec. 190, sub. 5, *post.*) The reason is, that the contract of the maker of a note and the acceptor of a bill is absolute to pay at maturity, while the contract of the endorser and drawer is conditioned upon presentment at maturity to the principal debtor, its dishonor by him, and due notice of such dishonor. (See Warranty of endorser, Sec. 173, sub. 4, *supra*, and Rights of endorser, Sec. 178, *supra*.)

SECTION 198. *How, when and where made.* Presentment of a negotiable instrument for payment, when necessary, must be made as follows, as nearly as by reasonable diligence it is practicable:

1. The instrument must be presented by the holder, or his agent;
2. The instrument must be presented to the principal debtor, if he can be found, at the place where presentment should be made; and if not,

then it must be presented to some other person having charge thereof, or employed therein, if one can be found there;

3. An instrument which specifies a place for its payment must be presented there; and if the place specified includes more than one house, then at the place of residence, or business, of the principal debtor, if it can be found therein;

4. An instrument which does not specify a place for its payment must be presented at the place of residence, or business, of the principal debtor, or wherever he may be found, at the option of the presenter;

5. The instrument must be presented upon the day of its maturity, or, if it is payable on demand, it may be presented upon any day. It must be presented within reasonable hours; and if it is payable at a banking house, within the usual banking hours of the vicinity, but, by the consent of the person to whom it should be presented, it may be presented at any hour of the day; (see Apparent maturity, Secs. 199-201, *post*);

6. If the principal debtor has no place of business, or if his place of business, or residence, cannot, with reasonable diligence, be ascertained, presentment for payment is excused.⁵⁵

(55) Civil Code, §3131

This section relates only to presentment when necessary to charge an endorser or the drawer, and does not change the liability of the principal debtor to be sued without formal demand. (See Demand not necessary to charge principal debtor, Sec. 197, *supra*.) Read also Secs. 204-208, *post*, which relate to the presentment of bills of exchange for payment more particularly.

SECTION 199. *Apparent maturity of negotiable instruments generally.* The apparent maturity of a negotiable instrument, payable at a particular time, is the day on which, by its terms, it becomes due, or when that is a holiday, the next business day.⁵⁶

SECTION 200. *Apparent maturity of bill payable at sight or on demand.* The apparent maturity of a bill of exchange payable at sight or on demand is,—

1. If it bears interest, one year after its date;
or

2. If it does not bear interest, ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance.⁵⁷

(56) Civil Code, §3132

(57) Civil Code, §3134

In regard to the presentment of such a bill—one payable at sight or on demand—for payment, it is to be noticed that a different rule exists as to the time for presentment of a bill payable on demand or at sight with interest and one payable without interest. In the first case, the drawer and endorsers are not released from liability by mere delay in presenting the bill; and in the other case they are exonerated if the bill is not presented in ten days. (See Presentment of bills of exchange for payment, Secs. 204-208, *post.*) As to when a bill of exchange will be presumed to be dishonored, see Non-acceptance, Sec. 191, *supra*.

SECTION 201. *Apparent maturity of note payable at sight or on demand.* The apparent maturity of a promissory note payable at sight or on demand is,—

1. If it bears interest, one year after its date;
or
2. If it does not bear interest, six months after its date.

Where a promissory note is payable at a certain time after sight or demand, such time is to be added to the periods mentioned above.

If a promissory note, payable on demand, or at sight, without interest, is not duly presented for payment within six months from its date, the en-

dorsers thereof are exonerated, unless such presentment is excused.⁵⁸ But mere delay in presenting a promissory note, payable with interest at sight or on demand, does not exonerate any party thereto.

SECTION 202. *Days of grace.* Days of grace are not allowed in this state.⁵⁹

SECTION 203. *Presentment, when excused.* The conditions under which presentment for payment may be excused are set forth in other parts of this manual, and it is only necessary to refer to them here. (See Presentment, how, when and where made, Sec. 198, sub. 6, *supra*; Presentment and notice of dishonor, when excused, Sec. 222, *post*; Presentment of bills of exchange, when excused, Sec. 208, *post*.)

Presentment of Bills of Exchange for Payment.

SECTION 204. *Where made, if not accepted.* If a bill of exchange is by its terms payable at a particular place, and is not accepted on presentment, it must be presented at the same place for payment, when presentment for payment is necessary.⁶⁰

(58) Civil Code, §§3135, 3136, 3248

(59) Civil Code, §3181

(60) Civil Code, §3211

SECTION 205. *Where made, if accepted.* A bill of exchange, accepted payable at a particular place, must be presented at that place for payment, when presentment for payment is necessary, and need not be presented elsewhere.⁶¹

SECTION 206. *When to be made if payable at sight or on demand, without interest.* If a bill of exchange, payable at sight or on demand, *without* interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence, be transmitted to the proper place for such presentment, the drawer and endorsers are exonerated, unless such presentment is excused.⁶²

As to bill payable at sight or on demand with interest, see next section.

SECTION 207. *Effect of delay if payable at sight or on demand with interest.* Mere delay in presenting a bill of exchange payable, with interest, at sight or on demand, does not exonerate any party thereto.⁶³ This applies also to promissory notes; and therefore, in the case of a note payable at sight or on demand, with interest, the endorser is not released from liability because of

(61) Civil Code, §3212

(62) Civil Code, §3213

(63) Civil Code, §3214

mere delay in presenting, notwithstanding its apparent maturity. (See Apparent maturity of note payable at sight or on demand, Sec. 201, *supra*.)

SECTION 208. *When excused.* Presentment of a bill of exchange for payment, as well as for acceptance, and notice of its dishonor are excused as to the drawer, if he forbids the acceptor to pay the bill, or if, at the time of drawing, he had no reason to believe that the drawee would pay the bill. (See Presentment for acceptance, when excused, Sec. 184, *supra*.) Also, if the drawee have no place of business, or if his place of business or residence cannot with reasonable diligence be ascertained, presentment for payment is excused. (See Bill of Exchange, where payable, Sec. 149, *supra*.)

Extinction of Negotiable Instruments.

SECTION 209. *Obligation, when extinguished.* The obligation of a party to a negotiable instrument is extinguished,—

1. In like manner with that of parties to contracts in general; or
2. By payment of the amount due upon the instrument, at or after its maturity, in good faith and in the ordinary course of business, to any

person having actual possession thereof and entitled by its terms to payment.⁶⁴

SECTION 210. *Surrender of instrument may be required.* A party to a negotiable instrument may require, as a condition concurrent to its payment by him,—

1. That the instrument be surrendered to him, unless it is lost or destroyed, or the holder has other claims upon it; or

2. If the holder has a right to retain the instrument, and does retain it, then that a receipt for the amount paid, or an exoneration of the party paying, be written thereon; or

3. If the instrument is lost or destroyed, then that the holder give to him a bond, executed by himself and two sufficient sureties, to indemnify him against any lawful claim thereon.⁶⁵

Dishonor of Negotiable Instruments.

SECTION 211. A negotiable instrument is dishonored when it is either not paid or not accepted, according to its tenor, on presentment for the purpose, or without presentment where that is excused.⁶⁶

(64) Civil Code, §3164

(65) Civil Code, §3137

(66) Civil Code, §3141

If dishonored, notice of dishonor must be given at the time and in the manner required by law in order to hold the endorser or drawer liable, or, if the instrument is protested, the next duty to perform is the making out of a protest and giving notice of protest. (See Rights of endorser, Sec. 178, *supra*.) This is due to the endorser or drawer and is intended to protect him from loss which may occur by reason of delay in making demand for payment on the party first liable, or which he may sustain by having no notice of the fact that his principal has failed or refused to pay.⁶⁷ In case the instrument is a foreign bill it must be protested, and while protest is not strictly necessary in case of an inland bill or promissory note as said before, the precaution is usually taken. Notice of protest is given in the same manner as notice of dishonor. (See Protest and notice of protest, Secs. 223-235, *post*; also notice of dishonor, Secs. 212-222, *post*.)

Notice of Dishonor.

SECTION 212. *By whom given.* Notice of the dishonor of a negotiable instrument may be given,—

1. By a holder thereof; or

(67) Stanley v. McElrath, 86 Cal., 457

2. By any party to the instrument who might be compelled to pay it to the holder, and who would, upon taking it up, have a right to reimbursement from the party to whom the notice is given.⁶⁸ (See Notice of protest, Sec. 231, *post.*)

SECTION 213. *Form of.* A notice of dishonor may be given in any form which describes the instrument with reasonable certainty, and substantially informs the party receiving it that the instrument has been dishonored.⁶⁹ The sufficiency of the notice of dishonor, has been the subject of much litigation, and this paper should be carefully drawn.

[Appendix Form No. 13.]

SECTION 214. *How served.* A notice of dishonor may be given,—

1. By delivering it to the party to be charged, personally, at any place; or

2. By delivering it to some person of discretion at the place of residence or business of such party, apparently acting for him; or

3. By properly folding the notice, directing it to the party to be charged, at his place of residence, according to the best information that the person giving the notice can obtain, depositing it

(68) Civil Code, §3142

(69) Civil Code, §3143

in the post-office most conveniently accessible from the place where the presentment was made, and paying the postage thereon.⁷⁰ (See When mailed, Sec. 217, *post.*)

SECTION 215. *How given in case of death of party to whom it is to be given.* In case of the death of a party to whom notice of dishonor should otherwise be given, the notice must be given to one of his personal representatives; or if there are none, then to any member of his family who resided with him at his death; or if there is none, then it must be mailed to his last place of residence, as prescribed by subdivision 3 of the last section. A notice of dishonor sent to a party after his death, but in ignorance thereof, and in good faith, is valid.⁷¹

SECTION 216. *When to be given.* Notice of dishonor, when given by the holder of an instrument or his agent, otherwise than by mail, must be given on the day of dishonor, or on the next business day thereafter.⁷² (See How given by agent, Sec. 218, *post.*)

SECTION 217. *When mailed.* When notice of dishonor is given by mail, it must be deposited

(70) Civil Code, §3144

(71) Civil Code, §§3145, 3146

(72) Civil Code, §3147

in the post-office in time for the first mail which closes after noon on the first business day succeeding the dishonor, and which leaves the place where the instrument was dishonored, for the place to which the notice should be sent.⁷³

SECTION 218. *How given by agent.* When the holder of a negotiable instrument, at the time of its dishonor, is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same manner as to an endorser, and his principal may give notice to any other party to be charged, as if he were himself an endorser. And if an agent of the owner employs a sub-agent, it is sufficient for each successive agent or sub-agent to give notice in like manner to his own principal.⁷⁴

SECTION 219. *Every additional party has his day to give notice.* Every party to a negotiable instrument, receiving notice of its dishonor, has the like time thereafter to give similar notice to prior parties as the original holder had after its dishonor. But this additional time is available only to the particular party entitled thereto.⁷⁵

SECTION 220. *Effect of.* A notice of the dishonor of a negotiable instrument, if valid in favor

(73) Civil Code, §3148

(74) Civil Code, §3149

(75) Civil Code, §3150

of the party giving it, inures to the benefit of all other parties thereto whose right to give the like notice has not then been lost.⁷⁶

SECTION 221. *When excused.* Notice of dishonor is excused,—

1. When the party by whom it should be given cannot, with reasonable diligence, ascertain either the place of residence or business of the party to be charged; or

2. When there is no post-office communication between the town of the party by whom the notice should be given and the town in which the place of residence or business of the party to be charged is situated; or

3. When the party to be charged is the same person who dishonors the instrument; or

4. When the notice is waived by the party entitled thereto.⁷⁷

Notice is also excused under the conditions set forth in the following paragraph.

SECTION 222. *Presentment and notice when excused.* Presentment and notice are excused as to any party to a negotiable instrument who in-

(76) Civil Code, §3151

(77) Civil Code, §3155

forms the holder within ten days before its maturity that it will be dishonored.

If, before or after the maturity of an instrument, an endorser has received full security for the amount thereof, or the maker has assigned all his estate to him as such security, presentment and notice to him are excused.

Delay in presentment, or in giving notice of dishonor, is excused when caused by circumstances which the party delaying could not have avoided by the exercise of reasonable care and diligence.

A waiver of presentment waives notice of dishonor also, unless the contrary is expressly stipulated; but a waiver of notice does not waive presentment.

A waiver of protest on any negotiable instrument other than a foreign bill of exchange waives presentment and notice.

Protest.

SECTION 223. *Definition and nature of.* The word "protest" is the name of the formal instrument drawn up and signed by a notary public alleging the due presentment and dishonor of a bill or note and declaring that the notary does protest the same for non-acceptance or non-payment as the case may be, (see How made, Sec. 226,

post), but as used generally it includes all the steps necessary to protect the payee against loss by reason of the non-acceptance or non-payment of a bill, or of the non-payment of a note by the maker, and to fix the liability of the drawer of the bill or the endorser of the note. These steps are, if the instrument is a bill, presentment for acceptance to the drawee, and in case of refusal or failure to accept, the drawing up, or "writing" of a protest for non-acceptance, and the giving of due notice of protest to the drawer; if the instrument is a bill which has been accepted or a promissory note, presentment for payment at maturity to the acceptor or maker, and in case of dishonor, protest for non-payment, and due and reasonable notice of protest for non-payment to the parties to be charged, viz.: the drawer and endorsers of the bill or the endorsers of the note. As already indicated, the purpose is to entitle the holder to recover the amount from the other parties to the bill. It does not raise any new debt or create any further responsibility, but only serves to give formal notice that the bill or note is not accepted or paid.

For failure to properly protest a note so as to charge an endorser, notary is liable on his bond.⁷⁸

(78) Consolidated Lumber Co. v. Fidelity, etc. Co., 161 Cal., 397

SECTION 224. *When necessary.* Notice of the dishonor of a foreign bill of exchange can be given only by notice of its protest.⁷⁹ It is a general law that in order to fix the liability of the drawer and endorsers of a foreign bill, the same must be protested. Protest, therefore, is indispensable to a foreign bill, and in case of action to recover on the instrument the facts of dishonor cannot be proved in any other way. The law does not require the protest of inland bills and promissory notes, but the law allows it, and when made the protest has the same force as if it was necessary to make it. (See Foreign and inland bills, Sec. 151, *supra*.) In cases, however, where protest is not essential and therefore not made, the same degree of diligence must be exercised in making demand and giving notice of dishonor as in cases where formal protest is required.

SECTION 225. *By whom made.* Protest must be made by a notary public, if with reasonable diligence one can be obtained; and if not, then by any reputable person, in the presence of two witnesses.⁸⁰

SECTION 226. *How made.* Protest must be made by an instrument in writing, giving a literal

(79) Civil Code, §3225

(80) Civil Code, §3226

copy of the bill of exchange, with all that is written thereon, or annexing the original; stating the presentment, and the manner in which it was made; the presence or absence of the drawee or acceptor, as the case may be; the refusal to accept or to pay, or the inability of the drawee to give a binding acceptance; and in case of refusal, the reason assigned, if any; and finally, protesting against all the parties to be charged.⁸¹

[Appendix Forms Nos. 14-18.]

SECTION 227. *Where made.* A protest for non-acceptance must be made in the city or town in which the bill is presented for acceptance; and a protest for non-payment, in the city or town in which it is presented for payment.⁸²

SECTION 228. *When made.* A protest must be noted on the day of presentment, or on the next business day; but it may be written out at any time thereafter.⁸³

“The ‘noting’ may be either upon the instrument protested, or in the notary’s register. It is a mere memorandum of the fact of presentment, of refusal of acceptance or payment, the name of the party to whom and the place where presented, with the time and date, and signed by the initials

(81) Civil Code, §3227
(82) Civil Code, §3228
(83) Civil Code, §3229

of the notary. When this is done, the full and complete protest may be made out at any time afterward, which act is known as 'extending the protest'.''⁸⁴

SECTION 229. *Effect of.* The protest of a notary, under his hand and official seal, of a bill of exchange, or promissory note, for non-acceptance or non-payment, stating the presentment for acceptance or payment, and the non-acceptance or non-payment thereof, the service of notice on any or all of the parties to such bill of exchange or promissory note, and specifying the mode of giving such notice, and the reputed place of residence of the party to such bill of exchange or promissory note, and of the party to whom the same was given, and the post-office nearest thereto, is *prima facie* evidence of the facts contained therein.⁸⁵

SECTION 230. *When excused.* The want of protest of a foreign bill of exchange, or delay in making the same, is excused in like cases with the want or delay of presentment.⁸⁶

SECTION 231. *Notice of protest.* Notice of protest must be given in the same manner as no-

(84) Proffatt on Notaries, §129

(85) Political Code, §795

(86) Civil Code, §3230

tice of dishonor, except that it may be given by the notary who makes the protest.⁸⁷ The giving of notice of dishonor is a part of the official duty of a notary for neglect of which he may be held liable on his official bond.⁸⁸

[Appendix Form No. 13.]

SECTION 232. *Waiver of.* If a foreign bill of exchange on its face waives protest, notice of dishonor may be given to any party thereto, in like manner as of an inland bill; except that if any endorser of such a bill expressly requires protest to be made, by a direction written on the bill at or before his endorsement, protest must be made, and notice thereof given to him and to all subsequent endorsers.⁸⁹

SECTION 233. *Payment for honor.* One who pays a foreign bill of exchange for honor must declare, before payment, in the presence of a person authorized to make protest, for whose honor he pays the same, in order to entitle him to reimbursement.⁹⁰

SECTION 234. *Damages allowed.* Damages are allowed as hereinafter prescribed, as a full compensation for interest accrued before notice of

(87) Civil Code, §3231

(88) *Tevis v. Randall*, 6 Cal., 633

(89) Civil Code, §3232

(90) Civil Code, §3233

dishonor, re-exchange, expenses, and all other damages, in favor of holders for value only, upon bills of exchange drawn or negotiated within this state, and protested for non-acceptance or non-payment.

Damages are allowed under the last section upon bills drawn upon any person,—

1. If drawn upon a person in this state, two dollars upon each one hundred dollars of the principal sum specified in the bill.

2. If drawn upon a person out of this state, five dollars upon each one hundred dollars of the principal sum specified in the bill.

3. If drawn upon a person in any place in a foreign country, fifteen dollars upon each one hundred dollars of the principal sum specified in the bill.

Such damages are estimated as follows: If the amount of a protested bill of exchange is expressed in money of the United States, damages are estimated upon such amount without regard to the rate of exchange. If the amount of a protested bill of exchange is expressed in foreign money, damages are estimated upon the value of a similar bill at the time of protest, in the place

nearest to the place where the bill was negotiated and where such bills are currently sold.⁹¹

SECTION 235. *Interest also allowed.* From the time of notice of dishonor and demand of payment, lawful interest must be allowed upon the aggregate amount of the principal sum specified in the bill, and the damages mentioned in the preceding section.

(91) Civil Code, §§3234-5, 3237-8

APPENDIX.

FORMS.

CERTIFICATES OF ACKNOWLEDGMENT.

No. 1.—General Form.

STATE OF CALIFORNIA }
City and County of San Francisco } ss

On this *first* day of *March* in the year one thousand nine hundred and *six*, before me, *J. B.*, a notary public in and for the said *city and* county of *San Francisco*, state of California, personally appeared *M. A.*, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

J. B.,
Notary Public

in and for the *City and* County of *San Francisco*,
State of California.

No. 2.—Husband and Wife (or Plural).

STATE OF CALIFORNIA {
County of *Santa Clara* }^{SS}

On this *first* day of *March* in the year one thousand nine hundred and *six*, before me, *C. A.*, a notary public in and for the said county of *Santa Clara*, state of California, personally appeared *H. W.* and *M. W.*, his wife, known to me to be the persons whose names are subscribed to the within instrument, and they and each of them acknowledged to me that they and each of them respectively executed the same.

In Witness Whereof, etc.

No. 3.—General—When Party is Proven.

STATE OF CALIFORNIA {
County of *Marin* }^{SS}

On this *first* day of *March* in the year one thousand nine hundred and *six*, before me, *A. B.*, a notary public in and for the said county of *Marin*, state of California, personally appeared *Joseph Smith*, satisfactorily proved to me to be the person described in and who executed the within instrument by the oath of *P. B.*, a competent and credible witness for that purpose by me duly sworn, and he, the said *Joseph Smith*, acknowledged to me that he executed the same.

In Witness Whereof, etc.

No. 4.—Corporation—President or Secretary.

STATE OF CALIFORNIA }
County of *Santa Barbara* }^{SS}

On this *first* day of *March* in the year one thousand nine hundred and *six*, before me, *M. T.*, a notary public in and for the said county of *Santa Barbara*, state of California, personally appeared *C. A. R.*, known to me to be the *president* (or secretary) of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In Witness Whereof, etc.

No. 5.—Corporation—President, Secretary or Other Person.

STATE OF CALIFORNIA }
County of *San Mateo* }^{SS}

On this *first* day of *March* in the year one thousand nine hundred and *six*, before me, *R. G.*, a notary public in and for the said county of *San Mateo*, state of California, personally appeared *L. A. H.*, known to me to be the *manager* (president, secretary, or other person) of the corporation described in and that executed the within instrument and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

In Witness Whereof, etc.

No. 6.—Corporation—by Two Officers.

STATE OF CALIFORNIA }
County of *Yuba*. } SS-

On this *first* day of *March* in the year one thousand nine hundred and *six*, before me, *P. B.*, a notary public in and for the county of *Yuba*, state of California, personally appeared *A. B.*, known to me to be the *vice-president*, and *C. D.*, known to me to be the *secretary* of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the corporation therein named, and they and each of them acknowledged to me that such corporation executed the same.

In Witness Whereof, etc.

No. 7.—Attorney in Fact.

STATE OF CALIFORNIA }
County of *Santa Cruz*. } SS

On this *first* day of *March* in the year one thousand nine hundred and *six*, before me, *S. M.*, a notary public in and for the county of *Santa Cruz*, state of California, personally appeared *J. P.*, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of *L. P.*, and the said *J. P.* duly acknowl-

edged to me that he subscribed the name of *L. P.* thereto as principal and his own name as attorney in fact.

In Witness Whereof, etc.

CERTIFICATES OF PROOF.

No. 8.—Subscribing Witness.

STATE OF CALIFORNIA }
County of *Solano*. }^{SS}

On this *first* day of *March* in the year one thousand nine hundred and *six*, before me, *A. S.*, a notary public in and for the county of *Solano*, state of California, personally appeared *W. P.* known to me to be the same person whose name is subscribed to the within instrument as a witness thereto, who, being by me duly sworn, deposed and said: That he resides in the town of *Suisun*; that he was present and saw *B. A.* (personally known to him to be the person described in and who executed the said instrument as party thereto), sign, seal and deliver the same; and that the said *B. A.* duly acknowledged in the presence of said affiant that he executed the same, and that he, the said affiant, thereupon and at his request, subscribed his name as a witness thereto.

In Witness Whereof, etc.

No. 9.—Handwriting—When All the Parties and Subscribing Witnesses Are Dead.

STATE OF CALIFORNIA }
County of *Sonoma*. } SS

On this *first* day of *March* in the year one thousand nine hundred and *six*, before me, *R. D.*, a notary public in and for the county of *Sonoma*, state of California, personally appeared *C. E.*, known to be a credible witness, and after being by me sworn in the manner and form required by law; I exhibited to him an instrument in writing, to-wit, the deed to which this certificate is attached, upon which is written the signature of *H. L.* as grantor and *K. A.* as subscribing witness. After being sworn, the said *C. E.* testified in substance as follows: That said instrument has never been acknowledged; that, at the date of said instrument, he knew personally *H. L.*, the said grantor, and *K. A.*, the said subscribing witness; that the parties and all the subscribing witnesses to said instrument are dead; that he then knew and now knows the handwriting of the said grantor and of the said subscribing witness; that the signature of the said grantor *H. L.* is genuine, and the signature of said *K. A.*, the only subscribing witness, is genuine; that he, the said witness,

resides in said county of *Sonoma*, state of California.

In Witness Whereof, etc.

**No. 10.—Handwriting—When Parties and Subscribing
Witnesses Are Nonresidents.**

STATE OF CALIFORNIA }
County of *Stanislaus*. }^{ss}

On this *first* day of *March* in the year one thousand nine hundred and *six*, before me, *G. H.*, a notary public in and for the county of *Stanislaus*, state of California, personally appeared *S. T.* known to me to be the person whose name is subscribed to the instrument to which this certificate is annexed, as a witness to the genuineness of the signature of *E. D.*, the grantor, and the genuineness of the signature of *F. P.*, the subscribing witness to said instrument. The said *S. T.* was sworn by me in the manner and form required by law, and testified in substance as follows: That he personally knew *E. D.*, the grantor, and *F. P.*, the subscribing witness, and also the grantee in said instrument named at the time said instrument was executed, to-wit, at the city of *Modesto*, County of *Stanislaus*, on the *second* day of *April* in the year *1901*; that since the execution of said instrument both of the parties to said instrument

and *F. P.* the sole subscribing witness to said instrument have become nonresidents of the state of California, to-wit, they reside in the *city of Paris, Republic of France*; that he, the said witness, is well acquainted with the signature of the grantor and with the signature of the said subscribing witness, and that the signature of the said grantor to said instrument and also the signature of the said subscribing witness, are genuine; that he is a resident of the town of *Newman*, county of *Stanislaus*, state of California, and that he subscribed his name to said instrument as a witness to the genuineness of the signatures of the said grantor and the said subscribing witness respectively.

In Witness Whereof, etc.

No. 11.—Handwriting—When Place of Residence Is
Unknown.

STATE OF CALIFORNIA }
County of *Solano*. }^{SS}

(Proceed as in No. 9 down to and including the words "After being duly sworn the said *C. E.* testified in substance as follows," and then add:) That he personally knew *H. L.* the grantor and, the subscribing witness, *K. A.*, at the date of said

instrument; that the place of residence of the parties and all the subscribing witnesses to said instrument is unknown to the said *C. E.*; that he, the said *C. E.* is the grantee named in said instrument; that said instrument was never acknowledged, and he desires to have it proved so that it may be recorded; that he has exercised due diligence to ascertain the residence of the parties and of the subscribing witnesses by making inquiries at their last known places of residence, by advertising in three daily papers published at their last known places of residence, for one week, and by personal inquiries among their friends, family and acquaintances, and he cannot ascertain the place of residence of all or any of said parties; that he is well acquainted with the signature of the said grantor and with the signature of the said subscribing witness, and that the signature of the said grantor to said instrument and also the signature of the said subscribing witness, are genuine; that he, the said *C. E.* is a resident of the city of *Fairfield*, county of *Solano*, state of *California*.

In Witness Whereof, etc.

CERTIFICATE TO DEPOSITION.

No. 12.—General Form.

STATE OF CALIFORNIA }
 County of *Placer*. } SS

I, *A. B. C.*, a notary public in and for said county, do hereby certify: That *B. A.*, the witness in the foregoing deposition named, was by me duly sworn; that said deposition was then taken at the time and place mentioned in the annexed order (or stipulation), to-wit, at my office of the county of *Placer*, state of California, and on the *first* day of *March, 1906*, between the hours of *10 a. m.* and *3 p. m.* of that day; that said deposition was reduced to writing by me (or taken in short-hand by *C. P.* and thereafter transcribed) and when completed was by me carefully read to said witness, and being by him corrected, was by him subscribed in my presence.

In Witness Whereof, etc.

NOTICE OF PROTEST.

No. 13.—Of Promissory Note.

UNITED STATES OF AMERICA }
 STATE OF CALIFORNIA } SS
 County of *Alameda*. }

Sir:

Please take notice that a certain promissory note dated *March 1, 1905*, for the sum of *three*

thousand dollars, payable *thirty* days after date, made by *P. L.* in favor of *T. R.* and endorsed by you, was this day presented by me, a notary public, to said *P. L.*, the maker of the said note, and payment thereof demanded, which was refused, and the said promissory note having been dishonored the same was this day protested by me for the nonpayment thereof, and the holder looks to you for the payment thereof, together with all costs, charges, interest, expenses, and damages already accrued, or that may hereafter accrue thereon by reason of the nonpayment of said promissory note.

Oakland, Cal. March 31, 1905.

Note: This form can be easily made applicable to the case of a bill of exchange.

PROTEST.

No. 14.—Of Note Payable at Particular Place—Notice of Protest Mailed.

UNITED STATES OF AMERICA	} ss
STATE OF CALIFORNIA	
<i>City and County of San Francisco.</i>	

On the *30th* day of *March*, in the year of our Lord one thousand nine hundred and *five*, at the request of *M. B.*, holder of the promissory note

hereinafter set forth, I, *H. K.*, a notary public duly commissioned and sworn, dwelling in the *city and county of San Francisco*, state of California, did, during business hours of said day, present the original promissory note (a copy of which is endorsed on the reverse side of this sheet) at the *Bank of California* in the *city and county of San Francisco*, where the same is made payable, and demanded payment thereof from the paying teller, which he refused, saying: "No authority to pay."

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly protest, as well as against the makers and endorsers as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest, already incurred and to be hereafter incurred for the nonpayment of the said promissory note.

I do hereby certify that on the *30th* day of *March*, A. D. *1905* notice of protest, demand and nonpayment of the above mentioned promissory note was served upon *A. B.* and *C. D.*, endorsers, by depositing the same in the United States Post Office in this city, postage fully pre-

paid thereon, directed to them respectively as follows:

A. B., Sacramento, California;

C. D., Santa Cruz, California;

such being the reputed places of residence of said respective parties and the post offices nearest thereto, according to the best information I could obtain.

Thus done and protested in the *city and* county of *San Francisco*, state of California aforesaid, the days and years above written.

(Seal)

H. K.

Notary Public

in and for the *city and* county of *San Francisco*, state of California.

**No. 15.—When Presented to Maker Personally—Notices
Served Personally, Etc.**

(Proceed as in No. 14 down to “(a copy of which is endorsed on the reverse side of this sheet)”, to the maker in the *city and* county of *San Francisco*, state of California, and demanded payment thereof from him personally, which he refused saying, “I have no money.”

Whereupon (proceed as in No. 14 to end of paragraph.)

I do hereby certify that on the *30th* day of *March, 1905*, notice of protest demand and non-payment of the above mentioned promissory note was served upon *M. B.* endorser, by delivering the same to him personally in said city (or, upon *T. R.* endorser, by delivering the same at his place of business, No. 3 Market Street, in this city, to a person of discretion in charge thereof, apparently acting for him).

(Close as in No. 14.)

**No. 16.—When Maker Cannot Be Found and Has No
Known Place of Business or Residence—Notices
Mailed.**

(Proceed as in No. 14 down to “(a copy of which is endorsed on the reverse side of this sheet)”, to several persons at several places in said city, and did make due and diligent search and inquiry for the maker to demand payment thereof, but I could not find him or anyone to pay said note. I was credibly informed that said *A. B.* did not reside here and had no office or place of business in San Francisco.

Whereupon (proceed as in No. 14 to end of paragraph.)

I do hereby certify (proceed as in No. 14).

No. 17.—When Last Place of Residence Is Known but
Maker Cannot Be Found—Notices Mailed.

(Proceed as in No. 14 down to and including “(a copy of which is endorsed on the reverse side of this sheet)”, at *No. 3500 Pine Street* in this city, which I was informed was the last reputed place of residence in this city of *T. B.* the maker, the demanded payment thereof from a person in charge of said place of residence, which he refused saying “*A. B.* formerly lived here but I do not know his present address.”

Whereupon (proceed as in No. 14 to the end.)

No. 18.—When Bill of Exchange Is Accepted for Honor—
Notices Mailed.

UNITED STATES OF AMERICA
STATE OF CALIFORNIA
City and County of San Francisco. } ss

On the *1st* day of *March*, in the year one thousand nine hundred and *six*, at the request of *T. B.*, holder of the bill of exchange hereinafter set forth, I, *H. K.*, a notary public duly commissioned and sworn, dwelling in the *city and* county of *San Francisco*, did, during business hours of said day, present the original bill of exchange (a copy of which is endorsed on the reverse side of

this sheet) at the place of business of *A. C. & Co.*, the drawees, *No. 417 Montgomery Street*, in this city, and demanded acceptance thereof from a member of the firm, which he refused saying "*No advice*". I then presented said draft to *G. D.* the drawee in case of need, and demanded acceptance thereof from him, to which he replied "I will accept this '*supra* protest' for the honor of *J. B.* the drawer."

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly protest, as well as against the drawer and endorsers as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages and interests, already incurred and to be hereafter incurred for the non-acceptance of the said bill of exchange.

I do hereby certify, that on the *2nd* day of *March, 1906*, notice of protest, demand and non-acceptance of the above mentioned bill of exchange was served upon the drawer and endorsers by depositing etc. (as in No. 14).

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